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No. (1)

In the Supreme Court of the United States

DERRICK TODD LEE,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether information acquired weeks after investigators conducted an unconstitutional search and seizure can form the basis for concluding that illegally obtained DNA evidence was not subject to exclusion because it would inevitably have been discovered through lawful means.

2. Should prejudice have been presumed and venue thus changed where Petitioner was convicted and sentenced to death for one of several alleged serial killings in a parish in which virtually all prospective jurors had been terrorized for ten months during the highly publicized hunt for the killer and immediately before trial were inundated by inflammatory publicity accompanying Petitioner's trial and conviction in an adjoining parish for another of the alleged serial killings.

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner, Derrick Todd Lee, respectfully petitions this Court to review the decision of the Louisiana Supreme Court.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court in *State v. Lee* consists of an opinion affirming the conviction and death sentence authored by Justice Knoll and a concurring opinion authored by Justice Johnson, which are published at 976 So. 2d 109 (La. 2008) (Appendix C hereto), and an unpublished appendix (Appendix B hereto). The Louisiana Supreme Court denied rehearing in an unpublished order (Appendix A hereto).

JURISDICTIONAL STATEMENT

The Louisiana Supreme Court affirmed Mr. Lee's conviction and death sentence on January 16, 2008, and denied his timely Application for Rehearing on March 7, 2008. Jurisdiction is invoked pursuant to 28 U.S.C. §1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following constitutional provisions.

The Fourth Amendment to the United States Constitution provides:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.*

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> *In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . . .*

The Eighth Amendment to the United States Constitution provides:

> *Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> *[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

STATEMENT OF THE CASE

A. Proceedings Below

On June 25, 2004, a grand jury in East Baton Rouge Parish, Louisiana, indicted Mr. Lee for first degree murder in connection with the death of Charlotte Murray Pace. That same day, the State formally noticed its intention to seek the death penalty. Voir dire commenced on September 13, 2004, and concluded on October 4, 2004. The guilt/innocence phase of trial, begun October 4, 2004, ended on October 12, 2004, with the jury's unanimous verdict of guilty of first degree murder. The penalty phase took place from October 13-14, 2004, and ended with the jury's rejection of Mr. Lee's mental retardation defense and verdict imposing the death penalty. Mr. Lee was formally sentenced to death on December 10, 2004, after the trial court denied his motion for a new trial.

The conviction and death sentence were automatically appealed to the Louisiana Supreme Court. On January 16, 2008, the court unanimously affirmed the conviction and death sentence; Justice Johnson separately authored a concurring opinion. *State v. Lee*, 976 So. 2d 109 (La. 2008). The court denied Mr. Lee's timely application for rehearing.

B. Statement of Relevant Facts

1. *The seizure of Mr. Lee's DNA and his subsequent arrest*

In the summer of 2002, Baton Rouge police set off a firestorm when they announced that a serial killer was targeting women in their homes and that the murders of Gina Green, Charlotte Pace and Pamela Kinamore had been linked by DNA to a single perpetrator. During the following ten-month investigation, the "Multi-Agency Task Force" ("the Task Force"), formed in August 2002 to investigate the serial killings, received approximately 26,000 tips on its hotline. To track down these leads, investigators conducted a DNA dragnet, securing through consent or compulsion a couple of thousand DNA samples from men in the region. Although Mr. Lee was one of the thousands of men identified by tips to the hotline as a possible suspect, the Task Force did not attempt to secure his DNA.

On May 5, 2003, however, investigators with the Louisiana Attorney General's Office and Zachary Police Department secured a subpoena duces tecum requiring Mr. Lee to submit DNA samples *instanter*,[1] ostensibly in connection with investigations of the 1998 disappearance of Randi Mebruer and 1992 death of Connie Warner in Zachary, Louisiana.[2] That same

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[1] At the suppression hearing, Investigator Todd Morris testified that no search warrant was secured and investigators did not attempt to obtain one in this case as they "didn't have enough probable cause for an arrest warrant for somebody." R. 4886-87. Rather, he testified, investigators were using the subpoena in an effort to develop probable cause for an arrest. R. 4891.

[2] Investigators, however, had not identified any biological material against which to compare Mr. Lee's DNA in the Warner and Mebruer cases and suggested at the time Mr. Lee's buccal

day, investigators located Mr. Lee and his children in the front, fenced-in yard of their home. They had Mr. Lee place his children in his vehicle and allow investigators into his livingroom to swab the inside cheeks of his mouth out of the children's sight. The swabs were turned in to the State Police Crime Lab on May 6, 2003. Natasha Poe, the DNA analyst assigned to the Mebruer case, however, did not begin testing the buccal swabs until May 20, 2003, being out of town when the samples were submitted.

On May 25, 2004, Poe matched the DNA profile derived from Mr. Lee's saliva samples to the DNA profile obtained from the serial killer cases. On May 26, 2003, Baton Rouge police secured an arrest warrant for Mr. Lee for the first degree murder of Carrie Lynn Yoder.[3] The factual basis for the arrest warrant set forth in the probable cause affidavit relied exclusively on the match between the DNA profile linking the Yoder, Green, Pace, Kinamore and Colomb murders obtained from the seizure of Mr. Lee's DNA on May 5, 2005. Arrest warrants in the other East Baton Rouge cases, including the Pace murder, were

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swabs were submitted to the crime lab that the results be compared to the serial killer's DNA profile.

[3] During the serial killer investigation, police linked the murders of Gina Green, Pamela Kinamore, Charlotte Pace, Dené Colomb and Carrie Yoder, which were committed in East Baton Rouge Parish and Lafayette Parish between September 2001 and March 2003. Subsequent to Mr. Lee's arrest for these offenses, he was charged with the murder of Geralyn DeSoto in West Baton Rouge Parish and the attempted murder of Diane Alexander in St. Martinville Parish.

issued on the same factual predicate on May 28, 2005, following Mr. Lee's arrest in Atlanta on May 27, 2003, in the Yoder case.

Prior to trial Mr. Lee moved to suppress the DNA evidence as the product of an illegal search and seizure. At the hearing on the motion, the State presented testimony that Mr. Lee had been identified as a suspect from a tip called in to the Task Force hotline on September 4, 2002, but had initially been ruled out because investigators were looking for a white man with a white truck based on eyewitness descriptions from all the murders. This lead was reopened on March 21, 2003, however, due to a new DNA analysis conducted by a Florida lab indicating the suspect might be of African descent and reports of a black male near the vicinity of the most recent murder. Det. Smith testified that the reopened lead on Mr. Lee was assigned to an investigator, Alfred Livingston,[4] who made a few unsuccessful trips to look for Mr. Lee and reported that West Feliciana Parish deputies were going to call him when they next saw Mr. Lee. According to Det. Smith, if Mr. Lee had not been swabbed, he and Officer Livingston would have continued to follow up on the lead until it was "closed out" through proof of alibi or by obtaining a DNA sample, either consensually, by developing probable cause and securing a warrant, or surreptitiously by, for instance, taking abandoned cigarette butts.[5]

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[4] Officer Livingston was not called to testify.

[5] Mr. Lee did not smoke. R. 4076.

The State also presented evidence that close to three weeks after the seizure of Mr. Lee's DNA, police received information in the investigation of the attempted first degree murder of a St. Martinville Parish woman, Diane Alexander, in July 2002, which they suspected was linked to the serial killings.[6] On May 23, 2003, the Task Force released a composite sketch of the man who had assaulted Alexander and a description of the vehicle he used, described as a gold, 1997, four-door Mitsubishi Mirage. In the next few days, the Task Force received four tips, two anonymously, identifying Mr. Lee as the man in the composite sketch[7] or who owned a gold car.[8] These tips were not followed up because Mr. Lee was identified and arrested as the serial killer on the basis of the DNA profile obtained on May 25, 2003. According to Sgt. Darryl Rice, had Mr. Lee not been arrested, the Task Force would have followed up on these leads.

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[6] At the time, the attack on Alexander had not been linked through DNA to the serial killings, although the Task Force spokeswoman testified that investigators were sure the same man was involved in all the crimes. On the basis of the match of Mr. Lee's DNA profile to the serial killer DNA profile, St. Martinville Parish detectives put together a six-photograph lineup that included Mr. Lee's photograph. The lineup was emailed to Alexander in the early morning hours of May 26, 2003, and she identified Mr. Lee as her attacker.

[7] The State did not present any evidence to suggest that these four calls were the only tips received by the Task Force following publication of the composite sketch.

[8] Mr. Lee and his wife owned a gold, 2-door Hyundai Excel.

The trial court denied Mr. Lee's motion to suppress the DNA evidence without articulating the basis for its ruling and the evidence was admitted against Mr. Lee at trial in support of his conviction and death sentence.

2. *Publicity surrounding the hunt for the serial killer and Mr. Lee's prosecutions in East Baton Rouge Parish and surrounding parishes*

On July 29, 2002, police announced that the May 31, 2002, home-invasion murder of Charlotte Pace was linked through DNA with the murders of two other Baton Rouge women, Gina Green, who was strangled in her home some time between September 23 and September 24, 2001, and Pamela Kinamore, who had been abducted from her home on the evening of July 12, 2002, and whose body was discovered in a culvert in Whiskey Bay, Louisiana, on July 16, 2002.

With the announcement of a killer targeting women in their homes, panic erupted in East Baton Rouge Parish. For close to a year, until authorities identified Mr. Lee as the so-called "Baton Rouge serial killer" and arrested him in late May 2003, East Baton Rouge Parish was terrorized by fear of a serial killer in its midst – fear that victimized virtually the entire population and that escalated as other murders were linked to the killer. As reflected in the voluminous media reports during this period,[9] the public's panic

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[9] The record in this case contains over 10,000 pages of print and television media reports and news clips from both local

prompted a surge in sales of guns, mace, and security alarm systems, and the public's thirst for information led police to conduct daily press conferences for several months[10] in which they detailed developments in the investigation and continuously cautioned women, especially, to be vigilant in protecting themselves. The public's fear was fueled by monthly rallies, organized by family members of the victims, that were held on the steps of the capitol and billboards over the interstate highway broadcasting the hunt for the serial killer. It was legitimized by legislative sessions addressing the crime and raising money for rewards for the successful capture of the vicious murderer. As the prosecutor explained during a hearing, "these murders that the defendant is accused of affected probably, if you include the Lafayette area and the metropolitan area of Baton Rouge, probably around

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and national sources. *See* Venue D-1, D-2, D-3, D-4 and D-5; R. 3362-3490. From the date that police announced that the Pace, Green and Kinamore murders were linked, until the date trial commenced, more than 650 articles (averaging one article every 1.2 days) were published in The Baton Rouge Advocate alone; more than half of these were published after Mr. Lee's arrest. *See* Venue D-2; R 2966-3188; *see also* Venue D-1 (5034 pages of printed media reports from newspaper and national television news programs published from July 2002 to November 2003). Jury questionnaires reveal that 68% of jurors questioned to seat the jury and alternates and 58% of the seated jury read The Baton Rouge Advocate.

[10] Although the number of routinely scheduled press conferences eventually decreased to twice a week, the resulting information void was simply filled with rumors, *see* Ryan Goudelocke, *Rumors Feed Demand for Serial-Killer News*, The Baton Rouge Advocate (1/29/03), at 7-B (Venue D-1, at 3078).

500 or 50 – I mean 550 or 600,000 people that for a number of months were terrified. They spent tens of thousands of dollars on guns and mace."[11]

Upon Mr. Lee's arrest as the suspected serial killer, East Baton Rouge Parish "breath[ed] a collective sigh of relief." Venue D-1, at 1025. "We can sleep easier, and we can begin to heal after six brutal murders and almost a year of absolute terror." Venue D-1, at 231.

Although the public's fear may have subsided following Mr. Lee's arrest, its fascination with his prosecution continued to generate substantial publicity up through the start of trial. Indeed, publicity regarding Mr. Lee surged just over a month before trial in this case when he tried and convicted in neighboring West Baton Rouge Parish for the second degree murder of Geralyn DeSoto, another of the alleged serial killer victims. Residents of East Baton Rouge Parish were bombarded on the eve of trial with a barrage of daily, mostly front-page stories in the Baton Rouge Advocate covering the West Baton Rouge prosecution and continued intense coverage following Mr. Lee's conviction.[12] This coverage detailed evidence

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[11] During voir dire, numerous jurors testified to feeling a sense of relief when Mr. Lee was arrested. *See, e.g.*, R. 5251, 5902, 6007, 6172, 6452, 6589, 6617, 6638, 6968-69, 7180, 7370, 7468, 7661.

[12] The Advocate published thirty-five articles during the 42-day period from the start of the West Baton Rouge trial on August 2, 2004, and the start of the East Baton Rouge trial on September 13, 2004. More than half of Mr. Lee's East Baton

that was not admitted in the East Baton Rouge trial,[13] highlighted the pain of the victims' family members as they watched the proceedings and their desire for a death sentence in the East Baton Rouge case, reported prosecutors' glee at the help the case would provide East Baton Rouge Parish in ultimately obtaining a death sentence against Mr. Lee, and gave prospective jurors in East Baton Rouge a primer on how to survive voir dire. Although East Baton Rouge Parish prosecutors chose not to introduce Mr. Lee's conviction in either the guilt or penalty phases of the trial, the West Baton Rouge Parish verdict sat as an invisible participant in the East Baton Rouge Parish courthouse and jury room.[14]

Prior to trial, Mr. Lee moved to change venue. Following a hearing, the trial court pretermitted ruling on the merits until voir dire. During voir dire, over

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Rouge Parish jury was familiar with his recent conviction in West Baton Rouge Parish.

[13] Unlike the prosecution in this case, the West Baton Rouge case was not entirely dependent on DNA evidence linking Mr. Lee to the offense and included evidence placing Mr. Lee in the vicinity of the murder on the day of the crime and linking him to boot prints left at the scene.

[14] Much of the publicity generated in the case, both prior to and after Mr. Lee's arrest, was highly prejudicial. It included speculation that Mr. Lee had committed dozens of unsolved murders in the region; aspects of Mr. Lee's criminal history and statement to police that were not introduced into evidence at trial; inflammatory remarks by public officials, including prosecutors, the governor, gubernatorial candidates and state legislators; and extensive interviews with family members of the victims, who did not camouflage their desire for Mr. Lee's execution.

98% of the questioned jurors admitted familiarity with the facts of the case; numerous prospective jurors stated they believed Mr. Lee was guilty of the serial murders (including individuals who ultimately sat on Mr. Lee's jury); and more than 85% of jurors questioned about the West Baton Rouge conviction stated they were aware of it. Despite these factors, the trial court concluded a fair jury could be selected and denied Mr. Lee's renewed motion to change venue in the middle of voir dire.

C. The Louisiana Supreme Court's Opinion

On direct appeal, the Louisiana Supreme Court unanimously affirmed Mr. Lee's conviction and death sentence.

1. *The court held that the warrantless seizure of Mr. Lee's DNA violated the Fourth Amendment, but concluded that suppression of the evidence was unnecessary under the inevitable discovery doctrine*

Mr. Lee challenged the trial court's denial of his motion to suppress the DNA evidence, contending that his saliva and skin cells were seized in violation of his rights under the Fourth Amendment. The Louisiana Supreme Court unanimously agreed that the investigators violated Mr. Lee's Fourth Amendment rights by taking his DNA without a warrant or

probable cause.[15] *State v. Lee*, 976 So. 2d 109, 122-27 (La. 2008). The court, however, concluded that under the "inevitable discovery" exception to the exclusionary rule set forth in *Nix v. Williams*, 467 U.S. 431 (1984), the State's violation did not require suppression of the evidence in light of the four tips identifying Mr. Lee as the individual pictured in a composite sketch of Diane Alexander's assailant or as the owner of a gold car like that driven by the assailant, which were called in to the Task Force hotline well after investigators had conducted the illegal seizure of Mr. Lee's DNA. *Id.* at 129-30. The court found that the sequence of events

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[15] The Louisiana Supreme Court found the following allegations insufficient to establish probable cause:

> [that] (1) defendant had been arrested years before on a "Peeping Tom" charge in the subdivision in which the two victims in Zachary had been abducted and/or murdered; (2) defendant had an extensive criminal record involving arrests, charges, and/or convictions for burglary, attempted burglary, stalking, aggravated battery, trespassing, and "Peeping Torn" charges; (3) both defendant and his girl friend indicated he had occasion to drive past Randi Mebruer's subdivision the night she disappeared; (4) defendant was not incarcerated at the time of the abduction/murders of the two Zachary victims, or of any of the other serial killer's victims; and (5) a friend of defendant informed police that defendant had told him the "police were harassing him" about the disappearance of a Zachary woman just two days after Mebruer's disappearance.

State v. Lee, 976 So. 2d 109, 126 (La. 2008).

surrounding the composite sketch showed that Mr. Lee's "apprehension was no longer an object of pure speculation, but rather a matter of imminent reality. The tips various citizens called in provided probable cause to arrest defendant as Alexander's assailant. Through the pursuit of this entirely independent investigation based on information entirely untainted by the prior collection of defendant's DNA sample, it is evident the police *would* have arrested the defendant and *would* have secured a DNA sample." *Id.* at 131 (emphasis original).[16]

2. *The court held that a change of venue was not required in this case*

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[16] The court also suggested that discovery of Mr. Lee's DNA was inevitable because the early tip to the Task Force had been reopened once investigators decided not to limit their search to white men, and investigators had testified they would have "worked the lead on defendant until it too could have been cleared by alibi or DNA exclusion." *Id.* at 129. The court, however, did not base its inevitable discovery ruling on these factors, instead choosing to rely on the four tips telephoned into the Task Force hotline on May 23 and 24, 2003. *Id.* at 129. The court characterized as "historical facts capable of ready verification or impeachment," the testimony of Task Force members that, having reopened Mr. Lee's file, they would have closed the lead against him by obtaining his DNA either through consent, a warrant or the clandestine taking of his DNA. *Id.* However, the conclusion that Mr. Lee's DNA would have been *legally* seized through such investigation is a matter of speculation. *See, e.g., Kohler v. Englade*, 470 F.3d 1104, 1110-13 (5th Cir. 2006) (holding that Task Force lacked probable cause for warrant used to seize plaintiff's DNA during the hunt for the Baton Rouge serial killer).

Mr. Lee argued that he was denied his rights to a fair and reliable determination of his guilt and punishment because trial was conducted in a jurisdiction in which the jury pool had been tainted by prejudicial pretrial publicity. The Louisiana Supreme Court rejected this claim. It conceded "that media coverage was extensive from the time of defendant's arrest through his trial," but concluded that Mr. Lee had not shown that the publicity was inflammatory. *Id.* at 135. It recognized that 123 of 125 questioned jurors admitted familiarity with the case, but noted that the trial court excused only 32% of the jurors for cause on the basis of their exposure to pretrial publicity and that the trial court only denied sixteen defense cause challenges. *Id.* at 133, 135. It dismissed as inconsequential the publicity generated before Mr. Lee had been identified as the Baton Rouge serial killer, observing that "for the greater part of the serial killer investigation, law enforcement focused on several suspects, including the delusory 'white man in a white pickup truck.'" and, consequently, "defendant was not the subject of media coverage for a prolonged period of time and publicity involving him was not initiated until his identification and arrest." *Id.* at 136.

Justice Johnson wrote a separate concurring opinion in which she noted that "the defendant who is required to wait for voir dire examination before winning a change of venue, is prejudiced, when compared to the defendant who won the change of venue, pre-trial" and suggested that the better practice may be to adjudicate such claims prior to trial. *Id.* at 151. (Johnson, J., concurring).

REASONS FOR GRANTING THE WRIT

I. This Court should grant *certiorari* to answer important questions regarding the scope of the inevitable discovery exception to the exclusionary rule and its application to the warrantless seizure of genetic material

This case raises important unanswered questions regarding the contours of the "inevitable discovery" doctrine adopted in *Nix v. Williams*, 467 U.S. 431 (1984), concerning which lower courts are divided. Most significantly, the Louisiana Supreme Court's conclusion that the determination of inevitability may be based on information that arose weeks after investigators illegally seized Mr. Lee's DNA conflicts with the decisions of numerous federal and state courts that have construed *Williams* to limit the analysis to information known to police at the time of the constitutional violation. Moreover, this case is of surpassing importance, given the incentive the Louisiana Supreme Court's ruling provides for law enforcement officers to bypass the constraints imposed by the Fourth Amendment and to adopt a "take, wait and see" approach to evidence collection on the belief that the illegality of a search or seizure may be retrospectively nullified by information obtained well after the constitutional violation has occurred.

A. This Court should grant *certiorari* to resolve a split in the lower courts regarding whether the "historical facts" on which a finding of inevitable discovery is based should be limited

to information known to investigators at the time they conducted an illegal search or seizure

The Fourth Amendment protects the people from unreasonable government searches and seizures of "their persons, houses, papers and effects," by requiring a search warrant issued "upon probable cause, supported by oath or affirmation, and particularly describing the . . . persons or things to be seized." U.S. Const. amend IV. "When evidence is obtained in violation of the Fourth Amendment, the judicially developed exclusionary rule usually precludes its use in a criminal proceeding against the victim of the illegal search and seizure." *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citations omitted). The exclusionary rule's "purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 217 (1960); *see also United States v. Calandra*, 414 U.S. 338, 347 (1974) ("[T]he rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.").

Because of the societal cost of excluding probative evidence from criminal trials, this Court has crafted certain exceptions to the exclusionary rule where its deterrence purpose is not advanced by suppression of the wrongfully obtained evidence.[17] At

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[17] *See, e.g., United States v. Leon*, 468 U.S. 897 (1984) (good faith exception); *Segura v. United States*, 468 U.S. 796 (1984) (independent source exception); *Nix v. Williams*, 467 U.S.

issue here is the inevitable discovery exception adopted by this Court in *Nix v. Williams*, 467 U.S. 431 (1984), which held that the exclusionary rule should not apply to evidence derived from a violation of the defendant's constitutional rights if such evidence would inevitably have been discovered in the absence of official misconduct.

The inevitable discovery doctrine is "an extrapolation from the independent source doctrine,"[18] with an important distinction. The independent source doctrine applies where authorities have actually secured the challenged evidence through an alternate, legal source. By contrast, "[a] finding of inevitable discovery necessarily rests on acts that did not occur." *United States v. Allen*, 159 F.3d 832, 840 (4th Cir. 1998). Because of the hypothetical nature of the inquiry, the *Williams* Court stressed that a finding of inevitability "involves *no speculative elements* but focuses on *demonstrated historical facts* capable of ready verification or impeachment . . . ." *Williams*, *supra*, 467 U.S. at 444 n. 5 (emphasis supplied).

The *Williams* majority did not clearly delineate the contours of the inevitable discovery doctrine apart from its analysis of the facts before it.[19] Nonetheless,

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431 (1984) (inevitable discovery exception); *Wong Sun v. United States*, 371 U.S. 471 (1963) (attenuation exception).

[18] *Murray v. United States*, 487 U.S. 533, 539 (1988).

[19] Justice Stevens' concurring opinion, however, emphasized that a finding of inevitability in the case was justified because the investigation that hypothetically would inevitably

the Court's analysis of those facts does not justify the expansive interpretation of inevitable discovery adopted by the Louisiana Supreme Court. In *Williams*, this Court held that evidence obtained from an illegal interrogation of the defendant – the victim's body – need not be suppressed because the body would inevitably have been discovered absent the officer's misconduct. At the time of the improper interrogation, teams of investigators and volunteers had been conducting searches in grid pattern in the area where the victim's body was ultimately located. Testimony adduced at the suppression hearing established that "the search parties were approaching the actual location of the body, and . . . that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found." *Id.* at 449. In contrast, the Louisiana Supreme Court ruled that information that came into existence close to three weeks after the warrantless seizure of Mr. Lee's DNA – evidence that surfaced solely because of a chance delay in the analysis of the wrongfully seized evidence – would have provided investigators an independent legal means to secure the DNA evidence.

The Louisiana Supreme Court's holding squarely conflicts with the decisions of several federal and state courts, which have held that the determination of whether evidence would inevitably have been discovered must be based on the facts that

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have led to the evidence was ongoing at the time of the constitutional violation. *Williams*, *supra*, 467 U.S., at 457 (emphasis supplied).

were known at the time of the constitutional violation. *See, e.g., United States v. Kimes*, 246 F.3d 800, 804 (6th Cir. 2001); *United States v. Cabassa*, 62 F.3d 470, 473 (2nd Cir. 1995); *Allen, supra*, 159 F.3d at 841, n.3; *United States v. Cannon*, 981 F.2d 785, 789 (5th Cir. 1993); *United States v. Satterfield*, 743 F.2d 827, 846 (11th Cir. 1984); *Kabat v. State*, 867 So.2d 1153, 1157 (Ala. Crim. App. 2003); *State v. Badgett*, 512 A.2d 160, 171-72 (Conn. 1986); *State v. Moody*, 842 So. 2d 754, 759 (Fla. 2003); *see also State v. Flippo*, 575 S.E.2d 170, 190-91 and 190 n. 25 (W.Va. 2002) (adopting standard under state constitution on ground that this Court has not yet resolved the split in authority on the "active pursuit" requirement[20]).

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[20] Lower courts are split on whether the inevitable discovery doctrine requires proof of an ongoing alternate investigation at the time of the constitutional violation, sometimes referred to as the "active pursuit" requirement. *See, e.g.*, Eugene L. Shapiro, *Active Pursuit, Inevitable Discovery, and the Federal Circuits: The Search for Manageable Limitations Upon an Expansive Doctrine*, 39 Gonz. L. Rev. 295, 296 (2003/2004) ("*Active Pursuit, Inevitable Discovery*"); Stephen E. Hessler, *Note: Establishing Inevitability Without Active Pursuit: Defining the Inevitable Discovery Exception to the Fourth Amendment Exclusionary Rule*, 99 Mich. L. Rev. 238, 243-44 (2000). Professor LaFave has observed that "circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these investigative procedures were already in progress prior to the discovery via illegal means, as in *Nix v. Williams*, or where the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later." 6 LaFave, Search and Seizure: A Treatise on the Fourth Amendment, § 11.4 (a), p. 278-79 (4th ed. 2004).

There are compelling reasons to require that a finding of inevitable discovery be based on the facts known at the time law enforcement officers transgressed the Constitution. "[T]he inevitable discovery rule is not an exception to be invoked casually . . . ." *United States v. Gravens*, 129 F.3d 974, 980 (7th Cir. 1997). Rather, "[i]n carving out the 'inevitable discovery' exception to the taint doctrine, courts must use a surgeon's scalpel and not a meat axe," as careless application of the inevitable discovery rule encourages law enforcement to use unconstitutional shortcuts to obtain evidence. 6 LaFave, Search and Seizure, *supra*, at p. 268. The Second Circuit has explained that a focus on what was known at the time of the constitutional violation grounds the inquiry in facts subject to minimum speculation:

> [I]nevitable discovery analysis logically must begin with the progress of the investigation at the time of the government misconduct. This point of departure is fixed by the requirement that an inevitable discovery inquiry focus on "demonstrated historical facts" so as to keep speculation to an absolute minimum, *see Nix*, 467 U.S. at 444 n.5, although by its nature inevitable discovery analysis inevitably involves some degree of speculation. The exception requires the district court to determine, viewing affairs as they existed at the instant before the unlawful search,

> what *would have happened* had the unlawful search never occurred.

United States v. Eng. 975 F.2d 854, 861 (2d Cir. 1992) (emphasis original).

The circumstances of this case illustrate why such a rule is necessary. The Louisiana Supreme Court's analysis of the inevitability of discovery of Mr. Lee's DNA depended on an uncritical acceptance of a hypothetical chain of events the prosecution claimed would have occurred in the absence of investigators' misconduct.[21] The information that the State alleged

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[21] It appears far from certain that the four tips identifying Mr. Lee that were called in to the hotline following the release of the composite sketch on May 23, 2003, would have *inevitably* resulted in the issuance of a warrant to arrest Mr. Lee and secure his DNA. The prosecution did not present any evidence to establish that these four tips were the only ones received by the Task Force, even though the State bore the burden of proving that Mr. Lee's DNA would inevitably have been discovered through legal means. *See Williams, supra*, 467 U.S., at 444. Moreover, by the time the composite sketch was released, Mr. Lee was no longer in the Baton Rouge area. R. 7922. The prosecutor did not present evidence regarding the steps routinely taken by the Task Force when faced with a suspect no longer in the region, and the record does not offer facts sufficient to conclude that Baton Rouge investigators would inevitably have tracked Mr. Lee down in Atlanta, given the prosecution's failure to present evidence showing that the tips against Mr. Lee were sufficiently compelling compared to those against a host of other suspects to have prompted investigators to pursue Mr. Lee outside the jurisdiction. Moreover, although surviving victim Diane Alexander selected Mr. Lee's photograph from a lineup, the lineup was assembled on the basis of the wrongfully obtained DNA match, and Ms. Alexander may well have identified someone else if she had been shown photographs of other suspects.

would have provided an alternate legal path to the evidence came into existence solely due to an accidental delay in the analysis of the improperly seized DNA. Significantly, the delay in analyzing Mr. Lee's DNA actually gave the prosecution the opportunity to pursue this hypothetical avenue to Mr. Lee's arrest, had it seemed viable – but the State instead chose to seek arrest warrants against Mr. Lee on the basis of the evidence illegally seized on May 5, 2003, rather than to develop the leads it now claims would have provided a legal basis for Mr. Lee's arrest and the seizure of his DNA. While the decision to proceed on the basis of the warrantless seizure of Mr. Lee's DNA, rather than on legally obtained information, may have been based on a perceived need for expediency, "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (rejecting "murder scene exception" to warrant requirement).

Reliance on after-acquired information to excuse an illegal search and seizure through the inevitable discovery doctrine introduces a potentially unharnessed level of speculation that appears at odds with the careful efforts of the *Williams* Court to ground that exclusionary rule exception in virtual certainty. Given the lack of guidance from this Court regarding the scope of the inevitable discovery doctrine and the disagreement in the lower courts, the Court should grant *certiorari* to address whether the doctrine may be applied on the basis of information gathered well after police have seized evidence in violation of the Fourth Amendment's warrant requirement.

B. The Louisiana Supreme Court's opinion provides an incentive to law enforcement officers to bypass the Fourth Amendment's warrant requirement in order to secure evidence that conceivably may be legitimized by subsequent information that comes to light – an incentive that is particularly troubling in the context of DNA collection

Investigators wilfully chose to circumvent the constraints imposed by the Fourth Amendment's warrant clause when seizing Mr. Lee's DNA. At the time investigators sought a subpoena, rather than a warrant, to compel Mr. Lee's submission of buccal swabs ostensibly in connection with the Mebruer and Warner investigations, they had no basis to believe that the seizure of Mr. Lee's saliva would lead to relevant evidence in those cases as no biological evidence connected to the crimes had been identified. Moreover, investigators lacked reasonable, individualized suspicion, let alone probable cause, to believe that Mr. Lee was involved in those cases or the serial killings. The subpoena, moreover, was executed in the area entitled to heightened Fourth Amendment protection, the home and its curtilage,[22] and involved

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[22] *See, e.g., Kyllo v. United States*, 533 U.S. 27, 31 (2001); *California v. Ciraolo*, 476 U.S. 207, 212-213 (1986); *see also Hayes v. Florida*, 470 U.S. 811, 817 (1985) (suggesting that reasonable suspicion might suffice to allow a brief detention in the field for purposes of fingerprinting, but observing that "neither reasonable suspicion nor probable cause would suffice to permit the officers to make a warrantless entry into a person's house for the purpose of obtaining fingerprint identification").

intrusions into Mr. Lee's privacy and bodily integrity at their most fundamental level.[23]

The Louisiana Supreme Court's holding does not condemn this misconduct and, in fact, offers an incentive for future warrantless seizures by allowing information acquired later to nullify the constitutional violation. The North Dakota Supreme Court has rejected application of the inevitable discovery doctrine on the basis of after-acquired evidence precisely because it "would encourage law-enforcement shortcuts whenever evidence may be more readily obtained by unlawful means" and "would also encourage incomplete police investigations in the hope that

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[23] *See, e.g., Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989); *Schmerber v. California*, 384 U.S. 757, 767-768 (1966). In *Skinner*, this Court recognized that the seizure of bodily fluids for analysis involved intrusions of privacy in two distinct respects – the physical intrusion involved in obtaining the sample and the added intrusion arising from the "chemical analysis of the sample to obtain physiological data." *Skinner*, *supra*, 489 U.S., at 616. The seizure of DNA samples raises even greater privacy concerns. "In addition to the privacy interest implicated by physical extraction of the blood, the subsequent analysis of a blood sample for the identifying DNA characteristics constitutes an invasion into one's control over personal information not generally revealed to the public. The DNA print may ultimately contain vastly more information than a fingerprint, including the presence of genetic defects, predisposition to diseases, and perhaps even sexual orientation." Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 Tex. L. Rev. 49, 95-96 (1995); *see also United States v. Kincaid*, 379 F.3d 813, 873 (9th Cir. 2004) (Kozinski, J., dissenting) ("[T]he Fourth Amendment intrusion here is not primarily the taking of the blood, but seizure of the DNA fingerprint and its inclusion in a searchable database.").

information subsequently discovered would cure a defective warrant." *State v. Handtmann*, 437 N.W.2d 830, 838 (N.D. 1989). *See also* 6 LaFave, *Search and Seizure*, *supra*, at 269 (cautioning against application of inevitable discovery where police intentionally took shortcut to bypass Fourth Amendment's warrant requirement).

The risk that law enforcement officers will be inclined to take shortcuts to obtain evidence if after-acquired information may be used to excuse the misconduct is heightened in the context of DNA-evidence collection, where the perceived potential benefit of identifying an unknown perpetrator through a relatively new technology appears so great.[24] Indeed, such incentive is evident in the increasing use of DNA dragnets such as was used here in the search for the "Baton Rouge serial killer," despite the serious Fourth Amendment questions they raise.[25] *Cf. Davis v. Mississippi*, 394 U.S. 721, 726-27 (1969) (holding that fingerprints obtained during the brief detention of persons seized without probable cause in a police dragnet procedure were inadmissible in evidence and noting that "[n]othing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry,

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[24] In *Kyllo v. United States*, 533 U.S. 27, 34 (2001), this Court noted with concern the "power of technology to shrink the realm of guaranteed privacy."

[25] *See, e.g.*, Sepideh Esmaili, *Student Note: Searching for a Needle in a Haystack: The Constitutionality of Police DNA Dragnets*, 82 Chi.-Kent. L. Rev. 495, 495-96 (2007).

whether these intrusions be termed 'arrests' or 'investigatory detentions'"). At the same time, given the immutable nature of an individual's DNA,[26] there is far less justification for bypassing the Fourth Amendment's warrant requirement than in circumstances where the evidence may be lost or destroyed. *Cf. Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (warrantless seizure of petitioner's blood for analysis of alcohol content reasonable given potential destruction of evidence by passage of time).

The Court in *Williams* adopted the inevitable discovery doctrine as an exception to the exclusionary rule on the premise that "[i]f the prosecution can establish . . . that the information ultimately or inevitably would have been discovered by lawful means . . . then the deterrence rationale has so little basis that the evidence should be received." *Williams*, *supra*, 467 U.S., at 444. Here, by contrast, failure to apply the exclusionary rule will act as an incentive for law enforcement officers to ignore the limitations imposed by the Fourth Amendment. Under these circumstances, the justification for applying the exclusionary rule is particularly compelling. *See, e.g.*, *United States v. Cherry*, 759 F.2d 1196, 1205 (5th Cir. 1985); *Commonwealth v. Benoit*, 415 N.E.2d 818, 823

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[26] *See, e.g., In re Welfare of J.W.K.*, 583 N.W.2d 752, 756 (Minn. 1998) ("There clearly were no exigent circumstances justifying a warrantless forced removal of blood in this case. Unlike alcohol in the blood, which declines in percentage over a period of time, the DNA profile present in one's blood stays the same from day to day.").

(Mass. 1981).[27] Given the significance of this issue, Mr. Lee respectfully submits that *certiorari* should be granted to address whether the Louisiana Supreme Court erred in applying the inevitable discovery rule in this case.

II. The Court should grant *certiorari* to address whether the nature and degree of pretrial publicity rendered East Baton Rouge Parish a constitutionally unfit venue in which to conduct Mr. Lee's capital trial

The Sixth and Fourteenth Amendments to the United States Constitution secure to a criminal defendant the right to trial by an impartial and fair jury. *See, e.g.*, *Ristiano v. Ross*, 424 U.S. 589, 595 n.6 (1976). "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." *Groppi v. Wisconsin*, 400 U.S. 505, 509 (1971) (citations omitted). *See also In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process."). The constitutional guarantee of a fair trial by a panel of impartial, indifferent jurors governs every criminal

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[27] *See also* 6 LaFave, *supra*, Search and Seizure, at 269 ("If the [inevitable discovery] doctrine were applied when . . . a shortcut was intentionally taken, the effect would be to read out of the Fourth Amendment the requirement that other, more elaborate and protective procedures be followed. This is particularly apparent when the shortcut was a bypassing of the Fourth Amendment warrant requirement . . . .").

case "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Groppi*, *supra*, 400 U.S., at 509. It applies to the penalty phase of a capital trial, as well as the guilt-innocence phase. *See, e.g.*, *Morgan v. Illinois*, 504 U.S. 719, 728 (1992).[28]

Central to the right to a fair trial by an impartial jury is "the requirement that a jury's verdict 'must be based upon the evidence developed at the trial' . . . In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). As this Court has noted, "[a]ny criminal case that generates a great deal of publicity presents some risk that the publicity may compromise the right of the defendant to a fair trial" and, accordingly, trial courts must "be especially vigilant to guard against any impairment of the defendant's right to a verdict based

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[28] Because jurors decide not only guilt but punishment in capital cases, the Eighth Amendment's demand for greater reliability in capital sentencing heightens the need for juror impartiality. As some courts have noted, courts addressing change of venue motions should be mindful that "[t]he possibility of [the] death penalty . . . requires an exacting concern for reliability in the sentencing determination." *State v. Clark*, 442 So. 2d 1129, 1134 (La. 1983). *See, e.g.*, *People v. Williams*, 774 P.2d 146, 157 (Cal. 1989); *Johnson v. State*, 476 So. 2d 1195, 1214 (Miss. 1985); *State v. Williams*, 459 A.2d 641, 653 (N.J. 1983).

solely upon the evidence and the relevant law." *Chandler v. Florida*, 449 U.S. 560, 574 (1981).

A change of venue is one method this Court has recognized as a means to counter the corrosive effects of prejudicial publicity on a defendant's right to a fair trial. *See, e.g., Groppi, supra*, 400 U.S., at 510-11. Under this Court's precedents, a trial court's refusal to change venue is grounds for reversal upon a showing of either "presumed" or "actual" prejudice. *Murphy v. Florida*, 421 U.S. 794, 798-99 (1975). *See Sheppard v. Maxwell*, 384 U.S. 333 (1966) (prejudice presumed where trial conducted in "carnival atmosphere" created by press coverage); *Estes v. Texas*, 381 U.S. 53 (1965) (prejudice presumed where media coverage in courtroom disrupted trial); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (prejudice presumed due to defendant's televised confession); *Irvin v. Dowd*, 366 U.S. 717 (1961) (actual prejudice shown where prospective and empaneled jurors were subjected to inflammatory publicity shortly before trial); *see also Patton v. Yount*, 467 U.S. 1025, 1031 (1984) (noting that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed").

In this case, prejudice should have been presumed given the extraordinary degree of largely inflammatory publicity attending the case and two additional factors that remove this case from the typical high-profile prosecution: (1) the degree to which the crimes with which Mr. Lee was charged terrorized virtually the entire jury pool; and (2) the surge of prejudicial publicity that accompanied Mr. Lee's trial

and conviction on a related charge in an adjoining parish just over a month before jury selection in this case commenced.

A. Victimization of the jury pool

As conceded by the prosecutor in this case, "these murders that the defendant is accused of affected probably, if you include the Lafayette area and the metropolitan area of Baton Rouge, probably around . . . 550 or 600,000 people that for a number of months were terrified. They spent tens of thousands of dollars on guns and mace." R. 3973. Indeed, numerous prospective and seated jurors testified during voir dire that they were in fear for the safety of themselves or loved ones, and took steps to protect themselves during the ten-month hunt for the Baton Rouge serial killer. As victims themselves of the serial killings, members of the East Baton Rouge Parish jury pool had an interest in the case from which bias should have been presumed. *See, e.g.*, *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring) (observing that "there are some extreme situations that would justify a finding of implied bias," including "that the juror was a witness or somehow involved in the criminal transaction").

This Court has found that adjudication by a judge who has a personal interest in the outcome of the proceedings violates the right to trial by an impartial factfinder. *See, e.g.*, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (due process violated where defendant's "liberty or property [is subjected] to the judgment of a court the judge of which has a direct, personal, substantial,

pecuniary interest in reaching a conclusion against him in his case."); *see also Murchison, supra*, 349 U.S. 133 (due process violated where judge who presided over a "one-man grand jury" also presided over contempt proceedings relating to events that took place in the grand jury proceedings). Likewise, lower courts have found that individuals personally impacted by a particular crime should be presumed unable to sit as fair and dispassionate jurors. The Seventh Circuit has explained that bias may be presumed "in 'extreme' situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations," such as "where the prospective juror has been the victim of a crime or has experienced a situation similar to the one at issue in the trial." *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992) (citing cases). The court found that bias should be implied where jurors in a burglary trial were themselves burglarized in the middle of deliberations. *Id.*[29]

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[29] *See, e.g., United States v. Allsup*, 566 F.2d 68, 71-72 (9th Cir. 1977) (court should have excused jurors who worked for different branches of bank that had been robbed, as "[t]he potential for substantial emotional involvement adversely affecting impartiality, is evident when the prospective jurors work for the bank that has been robbed," given the "employment relationship coupled with a reasonable apprehension of violence by bank robbers"); *State v. Esposito*, 613 A.2d 242 (Ct. 1992) (court erred in crediting juror's assurances of impartiality where juror resided on the street where charged murder occurred, was shocked by the crime and revealed a personal stake in the case by admitting that an acquittal would put her in an awkward position in her neighborhood); *Montgomery v. Commonweath*, 819 S.W.2d 713, 717 (Ky. 1991) (in escape prosecution, court erred in denying

In this case, virtually the entire pool from which Mr. Lee's jury was selected was personally impacted by the crimes with which he was charged. Under these unique circumstances, prejudice should have been presumed and a change of venue granted.

B. Publicity regarding Mr. Lee's trial and conviction in a related case on the eve of his East Baton Rouge trial

Just over a month before Mr. Lee was capitally tried in East Baton Rouge Parish, he had been tried and convicted of the second degree murder of Geralyn DeSoto in West Baton Rouge Parish, a crime that had allegedly been linked to the serial killings through DNA evidence. The Baton Rouge Advocate inundated East Baton Rouge Parish with daily coverage of the West Baton Rouge proceedings. This publicity detailed evidence that was not introduced against Mr. Lee in East Baton Rouge Parish, and broadcast inflammatory comments by prosecutors and family members of all the serial killer victims. Although the West Baton Rouge conviction was not introduced into evidence in the East Baton Rouge trial, jurors' awareness of Mr. Lee's conviction for one of the alleged serial killings could not but influence their opinion when they were

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cause challenge to prospective juror who "felt fear and concern while the prisoners were out of prison," despite juror's representation that he could put aside his opinion); *see also United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2nd Cir. 1963) (venue should have been changed in prosecution for one of three murders brought in county that "had been thoroughly alarmed at the murders and the presence of a 'mad killer' in their midst").

called to sit in judgment of another allegedly linked offense.

This Court has found implied bias under similar circumstances. In *Leonard v. United States*, 378 U.S. 544 (1964), this Court reversed a conviction where the jury contained "five jurors who had heard the verdict" in a related case tried shortly before. The Court quoted approvingly the Solicitor General's comments in its confession of error: "Prospective jurors who have sat in the courtroom and heard a verdict returned against a man charged with crime in a similar case immediately prior to the trial of another indictment against him should be automatically disqualified from serving at the second trial, if the objection is raised at the outset." *Id.* at 545. *See also Smith*, *supra*, 455 U.S., at 223-24 (O'Connor, J, concurring) (noting this Court's finding of implied bias in *Leonard*).

Jurors in East Baton Rouge Parish were called upon to perform the impossible task of setting aside the concerns for their personal safety that had been aroused by the crimes for which Mr. Lee was ultimately charged and ignoring the logical inference that, if guilty of one of the alleged serial killings, he must be guilty of the others: prejudice should have been presumed.

Even without a presumption of prejudice, the immense volume of inflammatory publicity generated during the search for the serial killer and following Mr. Lee's arrest, its virtual total saturation in the pool from which Mr. Lee's jury was selected, and the fact that this publicity continued unabated up to the

beginning of Mr. Lee's trial should have led the lower court to find that Mr. Lee was denied a fair trial in East Baton Rouge, despite the representation of jurors that they could set aside their preconceived opinions and impartially consider the evidence. Indeed, the facts of this case are quite similar to those in *Irvin v. Dowd*, 366 U.S. 717 (1961), where this Court held that the petitioner was actually prejudiced by the trial court's failure to change venue to a location that had not been flooded with inflammatory publicity. Like Mr. Lee, the defendant in *Irvin* was charged with several murders that generated substantial hostility in the community where the crimes occurred, prejudicial publicity was published shortly before the trial, and voir dire revealed that this publicity had generated a "pattern of deep and bitter prejudice" against the accused. *Id.* at 727. Although the seated jurors indicated that they could set aside their opinions regarding the defendant's guilt, this Court recognized that their protestations of impartiality were not to be credited. *Id.* at 727-28. As this Court observed, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt." *Id.* at 728.

CONCLUSION

For the foregoing reasons, Mr. Lee respectfully requests that a writ of *certiorari* issue to review the judgment of the Louisiana Supreme Court in this matter.

Respectfully submitted,

Jelpi P. Picou, Jr.*
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[STATE SEAL]

Supreme Court
STATE OF LOUISIANA
New Orleans

CHIEF JUSTICE

PASCAL F. CALOGERO, JR.	First District

JUSTICES

JEFFREY P. VICTORY	Second District
JEANNETTE THERIOT KNOLL	Third District
CHET D. TRAYLOR	Fourth District
CATHERINE D. KIMBALL	Fifth District
JOHN L. WEIMER	Sixth District
BERNETTE J. JOHNSON	Seventh District

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March 7, 2008

Marcia A. Widder, Esq.
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New Orleans, LA 70113

Re: State of Louisiana
Vs.
Derrick Todd Lee
2005-KA-2098

Dear Counsel:

Enclosed please find a News Release, in the above entitled referenced case, documenting this Court's denial of the application for rehearing.

With kindest regards, I remain,

Very truly yours,
John Tarlton Olivier
Clerk of Court
/s/
By: Katherine Fontana
Deputy Clerk of Court

KAF/drc
Enclosure

cc: Hon. Richard D. Anderson
John Warren Sinquefield, Esq.
Monisa L. Thompson. Esq.
Dana J. Cummings, Esq.
Hon. Doug Moreau
Hon. Doug Welborn
Jelpi P. Picou, Jr., Esq.

Supreme Court of Louisiana

FOR IMMEDIATE NEWS RELEASE
NEWS RELEASE # 018

FROM: CLERK OF THE SUPREME COURT OF LOUISIANA

On the 7th day of March, 2008, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS DENIED:

2005-KA-2098	STATE OF LOUISIANA v. DERRICK TODD LEE (Parish of E. Baton Rouge)
2006-KA-1807	STATE OF LOUISIANA v. JESSE JAY MONTEJO (Parish of St. Tammany)
2006-C-2001 C/W 2006-C-2164	JOHN AND KLEA HEBERT v. RAPIDES PARISH POLICE JURY, ET AL. (Parish of Rapides)
2006-KO-2467	STATE OF LOUISIANA v. SHON P. SHAW (Parish of Caddo)
2006-K-2595	STATE OF LOUISIANA v. LEON D. FUSSELL (Parish of Lasalle)

2007-KK-0878	STATE OF LOUISIANA v. JAMES DUNN (Parish of Assumption) WEIMER, J., would grant rehearing. See dissent in this matter.
2007-C-1384	MICHAEL A. TEAGUE, M.D. v. ST. PAUL FIRE AND MARINE INSURANCE COMPANY, ST. PAUL INSURANCE COMPANY, SEALE, SMITH, ZUBER AND BARNETTE, DONALD ZUBER, CATHERINE NOBILE, CATHERINE LAUFFER, AND ABC INSURANCE AGENCY (Parish of E. Baton Rouge) JOHNSON, J., would grant a rehearing. VICTORY, J., would grant a rehearing. TRAYLOR, J., would grant a rehearing.

LEXSEE 976 SO.2D 109

Positive
As of: Jun 04, 2008

STATE OF LOUISIANA VERSUS DERRICK TODD LEE

NO. 2005-KA-2098

SUPREME COURT OF LOUISIANA

2005-2098 (La. 1/16/08); *976 So. 2d 109*; *2008 La. LEXIS 156*

January 16, 2008, Decided

SUBSEQUENT HISTORY: Rehearing denied by *State v. Lee, 2008 La. LEXIS 1093 (La., Mar. 7, 2008)*

PRIOR HISTORY: [**1]

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, FOR THE PARISH OF EAST BATON ROUGE, HONORABLE RICHARD D. ANDERSON, JUDGE.

State v. Lee, 964 So. 2d 967, 2007 La. App. LEXIS 1035 (La.App. 1 Cir., May 16, 2007)

State v. Lee, 879 So. 2d 173, 2004 La. App. LEXIS 841 (La.App. 1 Cir., Apr. 6, 2004)

DISPOSITION: AFFIRMED.

COUNSEL: For Appellant: CAPITAL APPEALS PROJECT, Jelpi Pierre Picou, Jr., Marcia Adele Widder.

For Appellee: Charles C. Foti, Jr., Attorney General, Douglas P. Moreau, District Attorney, John Warren Sinquefield, Monisa L. Thompson, Dana J. Cummings, Assistant District Attorneys.

JUDGES: KNOLL, Justice. JOHNSON, Justice, concurs and assigns reasons.

OPINION BY: KNOLL

OPINION

[*115] **KNOLL, JUSTICE**

On June 25, 2003, an East Baton Rouge Parish grand jury indicted defendant, Derrick Todd Lee, with the May 31, 2002, first-degree murder of Charlotte Murray Pace, a violation of *LA. REV. STAT. ANN. § 14:30.* Defendant's jury trial commenced on September 13, 2004, and the presentation of evidence ended on October 12, 2004. After hearing closing arguments at the conclusion of the guilt phase, receiving the trial court's instructions, and deliberating defendant's guilt, the jury returned a unanimous verdict of guilty of first-degree murder. At the conclusion [**2] of the penalty phase, the jury unanimously returned a verdict of death, finding the defendant committed the aggravated rape of the victim. The trial court

sentenced defendant to death in accordance with the jury verdict and denied defendant's motion for new trial on December 10, 2004.

This is a direct appeal under *LA. CONST. ANN. art. V,§ 5(D)* by the defendant, Derrick Todd Lee. Defendant appeals his conviction and sentence raising 32 assignments of error. We will address the most significant of these errors in this opinion, and the remaining errors will be addressed in an unpublished appendix. After a thorough review of the law and the evidence, for the following reasons we affirm defendant's first-degree murder conviction and the imposition of the death sentence.

FACTS

The victim, Charlotte Murray Pace, was a pretty 22 year old who had just graduated from Louisiana State University (LSU) as one of the youngest recipients of a MBA degree. Her family and friends called her Murray. After graduating from LSU; she continued her graduate work with the LSU Alumni Association until her job in Atlanta at the firm of Deloit and Touche would begin later that summer.

On Friday, May 31, 2002, after [**3] leaving her graduate work, Pace washed her newly acquired 1999 BMW at approximately 11:5.2 a.m. [1] and then went to her Baton Rouge townhouse at 1211 Sharlo that she shared with Rebecca Yeager, a close friend

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[1] The record shows the receipt the carwash provided definitively established the time she was there. This fact was further corroborated by surveillance films of the carwash at the time Pace was on the premises.

for six years, to await Rebecca's scheduled 1 p.m. arrival. Pace and Rebecca planned to travel to Alexandria, Louisiana to attend the weekend wedding of Grace Crouch, a former roommate. When Rebecca arrived [*116] at 2:00 p.m., she found Pace's almost completely nude body lying on the floor between the bedroom door and the bed. She observed blood all over the room, on the furniture, and all over the floor; the bed was made, but the bedspread was blood-soaked. She later also found blood in the kitchen and in the hallway to the bedroom. She saw Pace had many small holes in her chest and stomach, and Pace's throat was cut open. Unable to find the townhouse's portable phone, Rebecca used her cell phone to call a 9-1-1 operator and then flagged down a passing police car.

In addition to [**4] the Baton Rouge City Crime Scene Unit, the Baton Rouge police, including Detectives Ike Vavasseur, Don Greene and Chris Johnson, called the Louisiana State Police Crime Lab (Crime Lab) to collect trace evidence[2] and to conduct serological techniques prior to Moving Murray's body from the crime scene. The Crime Lab sent Julia D. Naylor, an expert in the field of forensic DNA analysis, to examine the crime scene. Her partner, Adam Becnel, accompanied her to the crime scene. Joining Naylor and Becnel at the crime scene were the East Baton Rouge Parish Coroner,

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[2] Julia Naylor, the forensic analyst with the Louisiana State Police Crime Lab, testified that trace evidence is usually referred to as very minute samples, such as hair. Trace evidence is almost anything that if you move the body of a victim it could get lost, damaged or contaminated.

Dr. Louis Cataldie, two members of the Coroner's office, Jason Doyle and Don Moreau, and three Baton Rouge crime scene technicians, David Fauntleroy, Darryl Busbin, and Charles Thompson. The police investigators found no evidence of a forced entry into the townhouse.

With the assistance of the crime scene investigators, Naylor took swabs from Pace's [**5] breasts and nipples, swabs from voided areas near the rib cage, a swab from her left buttock just below her vagina, and another swab on the decedent's left thigh. These samples were deemed important because a procedure referred to as "ALS" (Alternate Light Source)[3] revealed the presence of biological stains, e.g., urine, feces, saliva, or semen, that might yield valuable DNA evidence. In addition to this evidence, Fauntleroy, one of the crime scene technicians, found a clothing iron in the bedroom and four pieces of plastic, two black and two blue; the iron was in close proximity to Pace's body.[4] The base of the iron (the heating element) was blood-stained and the majority of the iron, including the handle and the cord, was missing. After the

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[3] The room is darkened as much as possible and a blue light is shone. In the present case, room darkness was achieved by closing the bedroom door and hanging either cloth or black paper over the bedroom [**6] window. The technician, through the use of a pair of orange glasses, was then able to see biological stains which fluoresce in the blue light.

[4] As noted in Dr. Cramer's autopsy report, Pace received blunt head injuries, including a fractured skull and blunt trauma to the eyeballs. Such injuries would have been consistent with blows inflicted with the iron.

investigative team gathered the individual pieces of evidence and labeled each according to protocol, they submitted the specimens to the Baton Rouge City Police who logged them into evidence and sent them to the Crime Lab for scientific analysis.

As noted in Dr. Cramer's autopsy report, Pace received blunt head injuries, including a fractured skull and blunt trauma to the eyeballs. Such injuries would have been consistent with blows inflicted with the iron.

After the crime scene was searched, the evidence secured, and bags were placed over Pace's hands, the Coroner's Office moved Pace's body to the morgue. At the morgue, Dr. Michael Cramer collected sexual assault kit evidence, taking swabbings from the vaginal and anal areas, as well as the breasts, and submitted the kit for scientific examination. Additionally, Dr. [*117] Cramer removed the bags from Pace's hands and took fingernail clippings for future scientific analysis. Pace's tank top and bra, which were found loosened and pulled above her breasts, were also removed. After this evidence was bagged and labeled, Dr. Cramer presented the items to Pamela Faye Young, a Baton Rouge City police officer who works in the crime scene division. Officer Young logged the evidence into the evidence log book at the police office and secured the evidence. [**7] This additional evidence was then also sent to the Louisiana State Police Crime Lab for scientific analysis.

Dr. Cramer's autopsy report enumerated 81 different wounds to Pace's body and opined that the

cause of death was exsanguination. He theorized that two patterns of stab wounds were present: one resembling lesions caused by a flat bladed screwdriver and the other resembling incised wounds from a knife. He also found. Pace sustained blunt injuries to the head with a fractured skull and blunt trauma to the eyeballs, together with multiple bruises to the upper and lower extremities. The heart, the liver and the lungs were perforated three times each; there was also a stab wound to the left area of the eyeball that penetrated into the cranial cavity after fracturing the left frontal bone. In addition, there was an impressive wound at the top of the neck with transaction of the cartilage and the esophagus accompanied with a severed left jugular vein.

Dr. Alfredo Suarez, an expert pathologist who reviewed Dr. Cramer's autopsy report and the accompanying photographs,[5] told the jury there were a number of defensive wounds on Pace's arms, forearms, hands and wrists inflicted as she attempted [**8] to ward off her assailant. He agreed with Dr. Cramer's opinion that Pace died as the result of exsanguination.

On June 13, 2002, Naylor began her DNA analysis of the evidence she obtained from the crime scene and the fingernail clippings obtained during the autopsy. Although Naylor detected seminal fluid on the swabs from Pace's left buttock and the

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[5] At the time Of trial the whereabouts of Dr. Michael Cramer were unknown. Dr. Cramer also performed the autopsies of Gina Wilson Green and Carrie Yoder.

vaginal and cervical areas, she obtained her most complete DNA profile from the sample taken from the victim's left buttock. Naylor calculated the probability of a random match to the genetic profile of Pace's assailant was 1 in 3.6 quadrillion persons. Naylor recorded the result of her tests in the various DNA data banks maintained at the local, state, and national levels, but she failed to identify a consistent profile with any DNA profile already logged into the systems. Pace's rape and murder remained unsolved during this time.

At the time of Pace's rape and murder, there were other unsolved violent rapes and murders of women in the Baton Rouge and Lafayette areas that caused the police [**9] to further investigate these homicides. Indeed, some time later when the DNA analysts in the State Police Crime Lab compared notes on DNA samples recovered from several victims of these unsolved homicides, it showed that a single perpetrator had committed the unsolved homicides of these women. The perpetrator was thus deemed a serial killer. Because some of these homicides were used at defendant's trial to show identity, motive, plan, system, and intent, we will now set forth the facts of five of these homicides the State used at defendant's trial.

On September 24, 2001, eight months prior to Pace's death, Gina Wilson Green, an attractive, successful registered nurse 40 years of age, was found strangled and [*118] raped just three doors away from Murray's townhouse. No signs of forced entry were evident: John Colter, the lead detective from the East Baton Rouge Parish Sheriffs Office,

opined that although Green's body was found in her bed, a struggle appeared to have begun in the hallway. He said that in the hallway there were large stains, later determined to be fecal matter, a clump of hair, and Green's earrings were separated a good distance on the floor; her shoes were found in different [**10] rooms. Crime scene personnel bagged the blouse Green was wearing, logged it into evidence, and submitted it to the Crime Lab for analysis.

Green's shorts, as well as her purse and cell phone, were missing. Through the assistance of Cingular Wireless, Green's cell phone provider, police officers recovered these items dumped behind a warehouse on Choctaw Street in Baton Rouge. In addition to those items, the police recovered a kitchen towel that appeared to come from Green's home.

In April 2002, Angela Ross, an expert in DNA analysis with the Crime Lab, obtained a complete DNA profile from a spot of blood recovered from the back elbow of Green's blouse. Consistent DNA profiles with that found on Green's blouse were also found on the kitchen towel and her blue jean shorts. Ross described the match probability on the blouse as 1 in 3.6 quadrillion. As Ross stated, "Currently the Earth's population is approximately 7 billion . . . and if . . . you would actually have to take over 500,000 Earth populations to have the chance of finding an individual that has the same exact combination of numbers at those locations." Trial Tr. vol. XXXV, 8641 (Oct. 8, 2004).

Approximately five weeks after Pace's [**11] murder, on July 8, 2002, Angela Ross and Julia Naylor, the two DNA analysts with the Crime Lab who had independently obtained DNA profiles in the Green and Pace murders, compared the DNA results in their respective cases. Immediately, it became apparent to them that the results from the DNA samples they independently examined in their respective cases indicated that a single perpetrator committed those homicides.

On July 9, 2002, Diane Alexander, an attractive nurse, was attacked at her home in Breaux Bridge, about 45 minutes west of Baton Rouge, in rural St. Martin Parish. On the morning of July 9, Alexander was getting ready for work when a black man, who identified himself as Anthony, knocked on her locked front door, asking for directions to the Montgomerys's. When Alexander said she did not know the Montgomerys, the man asked to use the telephone. He then asked her if her husband might know the Montgomerys. When she eventually informed him that her husband was not at home, the stranger's demeanor quickly changed. He forced his way into the mobile home and overpowered her. The intruder caught her by the throat, told her not to try anything because be was armed with a knife and that [**12] he would poke her in the eye. He then attempted' to rape her, but he could not maintain an erection. He then bludgeoned her and attempted to strangle her with a telephone cord he cut from the home computer that was close at hand.

Alexander placed her hand between the telephone cord and her neck in an effort to stop her

strangulation. She was passing in and out of consciousness when fortuitously her son, Herman, arrived at the residence. When the intruder heard Herman's car approach on the gravel driveway, the attacker ran out the backdoor. Herman saw the unfamiliar car at his parents's home. He described it as a gold Mitsubishi Eclipse with a "Hampton Has It" plate on the front and further noted it [*119] had a dent in the hood. He also observed a beige telephone cord hanging out of the car window.

When he entered the home, Herman found his mother on the floor, lying in a pool of blood. Alexander had a skull fracture and she was rushed via helicopter to a Lafayette hospital where she remained for five days. Crime scene personnel from St. Martin Parish secured evidence from the scene of the attack. Two significant items were preserved and logged into evidence for future forensic analysis: the [**13] severed end of the telephone cord that was cut from the computer and Alexander's dress with DNA evidence on it.

On July 15, 2002, Alexander gave a detailed description of her attacker to Detective Arthur Boyd of the St. Martin Parish Sheriff's Office. Through her description, a composite sketch of the attacker was made. The evidence from this crime scene and the sketch, which bore a striking resemblance to the defendant, would later become vital in resolving who the perpetrator was in the unsolved homicides of the women in the Baton Rouge and Lafayette areas. Despite the existence of this sketch, at this time the investigation leads were focused on an unknown white male driving a white pickup truck.

Just three days after Alexander's attack, Pamela Piglia Kinamore, a beautiful 44-year-old antique shop owner, was reported missing from her Baton Rouge home. On July 12, 2002, Kinamore's husband, Byron, arrived at their home in Briarwood Place at about 11:45 p.m. He found a full bathtub, spots of blood on a bedroom rug, and a minor dishelving of the bedroom furniture. His wife Pam was not at home.

Three days later, on July 16, 2002, a survey crew found a body just south of the Whiskey Bay [**14] exit on Interstate 10. Crime scene investigators also found a piece of telephone cord a few hundred feet from the body; later, forensic analysis would match this piece of cord to that cut from the home of Diane Alexander three days earlier. The body, which had been exposed to three days of summer heat, was initially unidentifiable. Only though the use of dental records was the body identified as being that of Pamela Piglia Kinamore.

An autopsy revealed that Kinamore had been strangled and three significant cut wounds, five and a-half, five, and four inches long, were evident in the neck. These neck wounds cut through the skin, the windpipe, below the larynx and the opening of the airway, and opened the right carotid artery and both jugular veins. A sexual assault kit was also utilized because there was physical evidence of forceful penetration of the vagina and the anus. Defensive injuries were seen on Kinamore's left hand, the right hand, the left elbow, the back of the forearm, the back of the arm, and the knees.

Vaginal swabbings. Were obtained during the autopsy and turned over to the Crime Lab for forensic analysis. Through scientific testing a DNA profile was procured. Although [**15] the profile did not produce a complete set of markers because of the body degradation, it was sufficiently extensive to genetically identify Kinamore's attacker as the same person who murdered Green and Pace.

Thereafter, police officials realized they were looking for the same perpetrator in multiple murders and a Multi-Agency Homicide Task Force was formed in August 2002 to track down the killer.

On November 21, 2002, Trineisha Dene Colomb, an attractive 23-year-old woman, disappeared from her Lafayette home. Her car, purse, and keys were found in Grand Coteau near the cemetery where her mother had been buried approximately [*120] seven months earlier. Three days later a hunter found Colomb's body in the woods near Scott, Louisiana. She was wearing only a T-shirt, bra, socks and tennis shoes. Investigators found a pair of fleece pants and a pair of underwear in underbrush near the body. A pool of blood about 30-feet from the body was found and there was evidence the body was dragged through mud to where it was found by the hunter. A forensic pathologist determined Colomb died of blunt force trauma to the head. During the autopsy, the pathologist also obtained a sexual assault kit, took swabbings, [**16] and submitted the kit for forensic investigation. Carolyn Booker, a DNA analyst with the Acadiana Crime Lab, visualized semen on the vaginal swabbings and obtained a DNA profile. The profile was consistent

with the DNA profile generated in the Green, Pace, and Kinamore murders.

Lastly, on March 3, 2003, Lee Ellis Stanton reported his girl friend, Carrie Yoder, a beautiful 26-year-old graduate student at LSU, disappeared from her home near campus. Stanton reported that he entered the residence through an unlocked window; after entering the residence, he discovered the front door unlocked. Other than a key holder that was askew, a broken necklace, and a small amount of blood on Yoder's purse, there was no indication of a struggle at Yoder's residence.

After days of searching, a commercial fisherman found Yoder's body on March 13, 2003, partially submerged at Whiskey Bay not far from where Kinamore's body had been found. Upon forensic examination and a complete autopsy, it was determined Yoder was raped, strangled, beaten, and stomped. A sexual assault kit was utilized during the autopsy and a complete DNA profile was obtained from the vaginal washings.[6] Natasha Poe, the DNA analyst who [**17] examined the evidence obtained from Yoder's sexual assault kit, opined the probability of a random match to the genetic profile of Yoder's assailant was 1 in 3.6 quadrillion persons. The DNA profile Poe identified was consistent with the DNA profiles obtained in the Green, Pace,

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[6] A review Of the record shows a vaginal washing is obtained when the medical examiner, using a syringe containing sterile water, injects the sterile water into the vaginal area and then the liquid is suctioned out and placed into a tube for laboratory analysis.

Kinamore, and Colomb murders. At trial, evidence was presented that showed defendant used a prepaid cell phone on March 3, 2003, three times at approximately 10 p.m. at locations within less than ten miles of Whiskey Bay, the place where Yoder's body was found.

Although the forensic evidence pointed to a single killer, the police had no match of this DNA profile to any that was electronically filed in the data bases maintained on either local, state, or national levels. Accordingly, the Task Force continued its investigation, followed leads turned in, and obtained hundreds of voluntary DNA swabbings.

During this time, on May 5, 2003, independent of the [**18] Task Force, the Zachary Police Department and the Louisiana Attorney General's Office,[7] working in concert on the unsolved 1992 murder of Connie Warner and the disappearance of Randi Mebruer on April 27, 1999, obtained a subpoena duces tecum to obtain DNA buccal swabbings from defendant. Pursuant to that subpoena, the police and investigators located defendant at his home, obtained two buccal DNA swabbings, [*121] and logged in this evidence at the Zachary Police Department. On the next day, May 6, 2003, the Zachary Police delivered defendant's buccal swabbings to the Crime Lab. On May 20,

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[7] Neither the Zachary Police Department nor the Louisiana Attorney General's Office were members of the Multi-Agency Homicide Task Force.

2003, Natasha Poe was assigned to test defendant's buccal swabbings and began her testing.

In the meantime, the Task Force expanded its search beyond looking for a white male in a white pickup truck because a Florida forensic lab had determined from several rare markers in the DNA that might suggest the suspect was African-American. Accordingly, on May 22, 2003, Diane Alexander again met with Detective Boyd of the St. Martin Parish Sheriff's Office, reviewed the sketch [**19] that was first produced from her description of her black assailant, and modified it only to adjust the hairline to show a razor edge. For the first time, the Task Force joined the St. Martin Parish Sheriff's Office to broadcast Alexander's modified sketch and her son Herman's description of the attacker's fleeing vehicle through television and print media on May 23, 2003. As detailed more fully herein, the Task Force began receiving calls almost immediately after publication of Alexander's composite drawing and the car description. All of the callers identified defendant as the assailant portrayed in Alexander's composite drawing.

Just afterwards, on May 25, 2003, Natasha Poe completed her analysis of the buccal swabs submitted by the Zachary Police Department. Poe's analysis identified defendant as the individual whose DNA profile was consistent with the DNA profile identified in the murders of Gina Wilson Green, Charlotte Murray Pace, Pamela Piglia Kinamore, Trineisha Dene Colomb, and Carrie Yoder. At that time, police authorities were notified,

but the decision was made to withhold defendant's name from the public.

Before defendant's identity was publicized, the Task Force emailed [**20] a photographic lineup of six individuals to Alexander; one of the photographs depicted defendant. Immediately, Alexander picked out defendant as her assailant, signed her name underneath the individual photograph she identified, and emailed her response to the Task Force.

Even though the Task Force was initially unable to locate defendant at his St. Francisville home, on May 26, 2003, it chose to release defendant's identification as the serial killer. On May 27, 2003, Chris J. Johnson, an East Baton Rouge Parish homicide detective, assisted by the FBI, the U.S. Marshals Service, and the Atlanta Police Department, arrested defendant in Atlanta, Georgia. Defendant did not contest his extradition to Louisiana.

After defendant's arrest and pursuant to a court order, blood was drawn from defendant for further DNA testing. The Louisiana State Police Crime Lab analyzed the blood drawn from defendant and determined that the likelihood of randomly finding another individual other than defendant having the same genetic profile was 1 in 3.6 quadrillion.

On March 31, 2004, the district court ruled the murders of Gina Wilson Green, Pamela Piglia Kinamore, Trineisha Dene Colomb, and Carrie Yoder, [**21] as well as the attempted rape and murder of Diane Alexander, were admissible other

crimes evidence for the limited purpose of proving identity, motive, plan, system, and intent. This matter then proceeded to trial by jury. As noted above, an unanimous jury found defendant guilty of the first-degree murder of Charlotte Murray Pace and determined the defendant should be sentenced to death.

[*122] **ASSIGNMENTS OF ERROR**

Motion to Suppress DNA

Defendant contends the trial court erred when, it denied his motion to suppress DNA evidence collected on May 5, 2003, by the Zachary Police Department and the Louisiana Attorney General's Office. Defendant's argument is threefold: (1) he did not consent to have his cheeks swabbed for a DNA sample; (2) there was no legal and constitutional basis for the use of an Attorney General's subpoena duces tecum issued under *LA. CODE CRIM. PROC. ANN. art. 66* without probable cause and not in conformity with the requirements of a search warrant; and (3) the inevitable discovery doctrine was inapplicable to the facts in this case.

The Louisiana and Federal constitutions prohibit unreasonable searches and seizures. U. S. CONSTITUTION ANN. art. IV; *LA. CONST. ANN. art. I, § 5.* [**22] A search warrant may issue only upon probable cause established to the satisfaction of a magistrate, by the affidavit of a credible person, particularly describing the person or place to be searched and the things to be seized. *LA. CONST. ANN. art. I, § 5*; *LA. CODE CRIM. PROC. ANN. art. 162.* Probable cause sufficient to issue a search

warrant "exists when the facts and circumstances within the affiant's knowledge and of which he has reasonably trustworthy information, are sufficient to support a reasonable belief that an offense has been committed and that evidence or contraband may be found at the place to be searched." *State v. Johnson, 408 So. 2d 1280, 1283 (La. 1982)*; *LA CODE CRIM. PRO. ANN. art. 162.* The task for a reviewing court is simply to insure that under the totality of the circumstances the magistrate had a "substantial basis" for concluding probable cause existed. *Illinois v. Gates, 462 U.S. 213, 236, 103 S.Ct. 2317, 2331, 76 L.Ed.2d 527 (1983).* Determination-of probable cause does not rest on the officer's subjective beliefs or attitudes, but turns on a completely objective evaluation of all the circumstances known to the officer at the time of his challenged action. [**23] *State v. Kalie, 96-2650 (La. 9/19/97), 699 So. 2d 879, 880.* A warrantless search is *per se* unreasonable unless it falls within certain limited, well-delineated exceptions to the warrant requirement. *Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1974)*; *State v. Hernandez, 410 So. 2d 1381 (La. 1982)*; *State v. Zito, 406 So. 2d 167 (La. 1981).* Warrants therefore are generally required to search an individual's home or person, "unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the *Fourth Amendment*." *State v. White, 399 So. 2d 172, 175. (La. 1981).* The trial court is afforded great discretion when ruling on a motion to suppress, and its ruling will not be disturbed absent an abuse of

that discretion. *State v. Vessell, 450 So. 2d 938, 943 (La. 1984).*

In *Schmerber v. California, 384 U.S. 757, 761-64, 86 S.Ct. 1826, 1830-32, 16 L.Ed.2d 908 (1966)*, the Supreme Court assumed that a search warrant resting on probable cause issued by a neutral magistrate would be required for all body-invasion searches; in that case a blood sample was used to determine blood-alcohol content. [**24] *Id., 384 U.S. at 770, 86 S.Ct. at 1835* ("Search warrants are ordinarily required for dwellings and, absent an emergency, no less could be required where intrusions into the human body are concerned."); compare *Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989)* (drug and alcohol testing of railroad employees constituted a "search" where it involved breath and urine analysis); *Cupp v. Murphy,* [*123] *412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973)* (involuntary collection of fingernail scrapings a search); *Winston v. Lee, 470 U.S. 753, 760-61, 105 S.Ct. 1611, 1616-17, 84 L.Ed.2d 662 (1985)* (order to compel surgical operation to remove a bullet constituted a search); *California v. Trombetta, 467 U.S. 479, 481, 104 S.Ct. 2528, 2530, 81 L.Ed.2d 413 (1984)* (breath test a search); *Rochin v. California, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952)* (induced vomiting violation of due process); with *United States v. Dionisio, 410 U.S. 1, 8, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973)* (production of voice exemplar not a search); *U.S. v. Mara, 410 U.S. 19, 21-22, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973)* (mandated production of handwriting exemplar [**25] not a

search); *Davis v. Mississippi, 394 U.S. 721, 727, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)* (collection of fingerprints not a search); *In re Shabazz, 200 F.Supp.2d 578, 581 (D.S.C. 2002)* (grand jury sought saliva sample after reasonable suspicion established, collection not a search where it was used in a grand jury setting to establish probable cause for later arrest).

The issue of DNA collection through a *LA. CODE GRIM. PROC. ANN. art. 66* Attorney General/District Attorney's investigatory subpoena duces tecum is res nova to this Court. Accordingly,' we find it appropriate to look at the decisions of other courts to examine their characterization of the collection of DNA in terms of the requirement for a search warrant.

According to the United States Fifth Circuit; "[i]t is undisputed that the collection of a saliva sample for DNA analysis is a search [requiring a warrant] implicating the *Fourth Amendment*." *Kohler v. Englade, 470 F.3d 1104, 1109 (5th Cir. 2006)*; see also, *Padgett v. Donald, 401 F.3d 1273, 1277 (11th Cir. 2005)* ("The Commissioner does not dispute that the statutorily required extraction of saliva for DNA profiling constitutes a 'search' within the meaning of the [Fourth] [**26] Amendment"); *Groceman v. U.S. Dep't of Justice, 354 F.3d 411, 413 (5th Cir. 2004)*. ("The extraction of blood from a prisoner to collect a DNA sample implicates *Fourth Amendment* rights."); *Schlicher v. (NFN) Peters, I & I, 103 F.3d 940, 942-43 (10th Cir. 1996)* ("It is agreed that the collection, analysis and storage of blood and saliva ... is a search and seizure within the meaning of the *Fourth*

Amendment"); *In re Grand Jury Proceeding, 455 F.Supp.2d 1281, 1282 (D.N.M. 2006)* (saliva samples may not be compelled by a grand jury on the mere chance that desired evidence might. be obtained); but see *Boling v. Romer, 101 F.3d 1336, 1340 (10th Cir. 1996)* (collection of sex offender inmate's saliva does not violate any expectation of privacy in the information revealed where the inmate has diminished privacy rights and procedure not dissimilar from fingerprinting); *State v. Lee, 05-0456 (La. App. 1 Cir. 5/16/07), 964 So. 2d 967, 2007 WL 1430374* (reasonable suspicion sufficient to justify subpoena duces tecum to compel production of buccal swab for DNA sample).[8] When the facts of the present case are compared [*124] to the aforementioned jurisprudence of other courts, we find the collection of [**27] defendant's DNA constituted a search.

Before addressing the heart of this issue as it pertains to defendant's motion to suppress and as a preliminary matter, we note the State argued to the

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[8] So as not to be confusing, we point out that defendant, Derrick Todd Lee, was also indicted in West Baton Rouge Parish with the first-degree murder of Geralyn Barr DeSoto, a violation of *LA. REV. STAT. ANN. § 14:30.* The State later amended the indictment to charge defendant with second-degree murder, a violation of *LA. REV. STAT. ANN. § 14:30.1.* The defendant pled not guilty and his trial began in West Baton Rouge Parish on August 2, 2004. After a trial by jury, defendant was found guilty as charged and the trial court sentenced him to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The Court of Appeal, First Circuit, affirmed defendant's conviction and sentence. *State v. Lee, 2005-0456 (La. App. 1 Cir. 5/16/07), 964 So. 2d 967, 2007 WL 1430374.*

trial court and again before us that defendant consented to produce DNA samples through the use of buccal swabbings of both cheeks. Thus, the State urges defendant's consent obviated the necessity for a search warrant.

For [**28] this argument to be successful, the State will have to hurdle the burden of showing more than acquiescence to a claim of lawful authority. As stated in Bumper v. North Carolina:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be 'discharged by showing no more than acquiescence to a claim of lawful authority. A search Conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all.

Bumper v. North Carolina, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).

In the present case, it is clear law enforcement officers from the Attorney General's. Office and the Zachary Police Department encountered defendant at his home, advised him they had a court order compelling him to submit to swabbing to obtain his

DNA, and showed him a subpoena duces tecum, requiring him to submit a DNA sample *instanter.* [**29] Given these facts, it is clear under *Bumper* defendant simply acquiesced to the lawful authority of law enforcement and it cannot be said that such acquiescence constituted free and Voluntary consent. Therefore, although the trial court never reached the issue of defendant's consent, we find no merit to the State's contention that defendant consented to the buccal swabbings.

The State next asserts a subpoena duces tecum issued by a judge under *LA. CODE CRIM. PROC. ANN. art. 66* is the "functional equivalent" of a search warrant that would not violate the protections of the *Fourth Amendment.*

LA. CODE CRIM. PROC. ANN. art. 66(A) states in relevant part:

> Upon written motion of the attorney general or district attorney setting forth reasonable grounds therefor, the court may order the clerk to issue subpoenas directed to the persons named in the motion, ordering them to appear at a time and place designated in the order for questioning by the attorney general or district attorney respectively, concerning any offense under investigation by him. The court may also order the issuance of a subpoena duces tecum.

The basis for the State's argument is that *art. 66* subpoenas and search warrants are [**30]

equivalent because both require review by a neutral magistrate. However, as recognized by the First Circuit in State v. Lee, a subpoena duces tecum does not require probable cause, as a search warrant does. State v. Lee, 05-0456, pp. 8-9.[9] A subpoena duces tecum [*125] can be supported by probable cause, but such a threshold showing is not required. A. District Attorney or the Attorney General must

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[9] In present case, the subpoena decus tecum commanded Lee "to produce a DNA specimen, instanter . . . and herein fail not under the penalty of law." As provide in LA. CODE CRIM. PROC. ANN. art 66(B). "[t]he contumacious failure of refusal of the person subpoenaed to appear in punishable as a contemp of court."

As an ancillary to that provission, it is also recognized in the jurisprudence that a person subpoened or ordered to appear may at any time seek protection by the court from hardship or abuse of process by moving to modify or quash the subpoena [**31] or order. See *In re, Grand Jury Subpoenas, 363 So. 2d 651, 655 (La. 1978)* (recognizing the motion to quash in the context of a grand jury subpoena). As authority for the motion to quash, the court in In re, Grand Jury Subpoenas cited *LA. CODE CRIM. PROC. ANN. art. 17* where it is recognized the district court possesses inherently all powers necessary for the enforcement of its orders and the performance of its duty to require that criminal proceedings be conducted with dignity, orderliness and justice. In addition, *LA. CODE CRIM. PROC. ANN. art. 732* provides: "A subpoena may order a person to produce at the trial or hearing, books, papers, documents, or any other tangible things in his possession or under his control, if a reasonably accurate description thereof is given; but the court shall vacate or modify the subpoena if it is unreasonable or oppressive." While in its brief the State argues that the recipient of the subpoena duces tecum can challenge its requirements before a magistrate, the subpoena at -issue in the present case ordered the production of the DNA sample *instanter,* thus' not allowing such a challenge here.

instead only establish "reasonable grounds" to support the subpoena, and as with any other subpoena, the issuing party must give "a reasonably accurate description" of what is sought. *LA. CODE GRIM. PROC. ANN. art. 66*; *LA. CODE CRIM. PROC. ANN. art. 732*.

In the present case, the State adduced testimony during redirect [**32] examination at the pre-trial suppression hearing that the purpose of the subpoena was to gather evidence to obtain probable cause to arrest defendant. For this reason it filed the court order authorizing the subpoena under seal to protect the intended target should the swabbings exclude him as a suspect.. Even though the State avers in the present case that a judge reviewed the subpoena request and stated at a pre-trial suppression hearing that he "realized the import of the request," "applied [the] probable cause standard," and "would have signed a search warrant," such treatment exceeded what is statutorily called for in *art. 66*.

Notwithstanding its *post hoc* finding of probable cause (after the DNA test led to the arrest of defendant), there is no way to ascertain which standard the judge utilized when presented with the *art. 66* request for the issuance of a subpoena duces tecum. Moreover, despite the State's claims of the equivalence of the subpoena to a search warrant, we observe the subpoena in the present case did not include the sworn supporting affidavit a search warrant is required to contain. *LA. CONST. ANN. art. I, § 5* ("No warrant shall issue without probable cause supported [**33] by oath or affirmation. . .").

As evidence in his testimony at the motion to suppress, the issuing judge twice acknowledged what he signed was not a search warrant.

Regardless, even assuming a subpoena duces tecum may constitute the functional equivalent of a search warrant in some circumstances, the application at a minimum must rest upon a showing of probable cause, not simply the "reasonable grounds" required by *art. 66*. Thus the application must contain within its four corners the facts establishing the existence of probable cause. *State v. Duncan, 420 So. 2d 1105 (La. 1982)*; *State v. Wells, 253 LA. 925, 221 So. 2d 50 (La. 1969)*. In passing on the validity of a search warrant (or its functional equivalent), a reviewing court may consider only information brought to the magistrate's attention. *Aguilar v. Texas, 378 U.S. 108, 109, n.1, 84 S. Ct.* [*126] *1509, 1511, 12 L. Ed. 2d 723*. In other words, to be a valid search, the State must have unintentionally obtained a de facto search warrant captioned as an *art. 66* subpoena duces tecum. Cf. *State v. Clark, 02-1463, p. 36 (La. 6/27/03), 851 So.2d 1055, 1081* (court order for production of blood sample equivalent of proper search warrant, notwithstanding its name, when it was [**34] "issued with all of the safeguards that a warrant affords" and probable cause found).

Assuming the correctness of the State's argument on this point, we nonetheless find it did not present the trial court sufficient facts to support a finding of probable cause for the lawful issuance of a warrant. In the present case, the State based its request for a subpoena on five factors: (1) defendant had been

arrested years before on a "Peeping Tom" charge in the subdivision in which the two victims in Zachary had been abducted and/or murdered; (2) defendant had an extensive criminal record involving arrests, charges, and/or convictions for burglary, attempted burglary, stalking, aggravated battery, trespassing, and. "Peeping Torn" charges; (3) both defendant and his girl friend indicated he had occasion to drive past Randi Mebruer's subdivision the night she disappeared; (4) defendant was not incarcerated at the time of the abduction/murders of the two Zachary victims, or of any of the other serial killer's victims; and (5) a friend of defendant informed police that defendant had told him the "police were harassing him" about the disappearance of a Zachary woman just two days after Mebruer's [**35] disappearance.

Even when considered under the totality-of-circumstances, we find these factors do not support the conclusion the State established probable cause in its subpoena request. See *Gates, 462 U.S. at 229-230, 103 S.Ct. at 2327-28.* When viewed from the perspective that this subpoena was sought before it was shown that defendant was conclusively linked by his DNA to the murders, his prior criminal history, his movements within the community, as well as his lack of incarceration at the time of those murders and those of the serial killer were insufficient to provide a reasonable basis to conclude he was involved with the Zachary abductions/murders. See e.g., *Kohler v. Englade, 470 F.3d 1104, 1111 (5th Cir. 2006)* ("While the use of prior arrests and convictions can be helpful in

establishing probable cause, especially where the previous arrest or conviction involves a crime of the same general nature as the one the warrant is seeking to uncover," burglary is not a crime of the same general nature as rape or murder)(citing *Greenstreet v. County of San Bernardino, 41 F.3d 1306, 1309 (9th Cir. 1994)*; *Robinson v. Texas, 03-04-0025 (Tex. App. Austin 9/7/06) S.W.3d. , 2006 Tex. App. LEXIS 8058* ("Appellant [**36] is correct to assert that neither his reputation, his prior criminal record, nor his presence in a high-crime neighborhood gave the officers probable cause to arrest him.").

Furthermore, a confidential informant's unsubstantiated declaration that defendant had mentioned "being harassed by the police about a missing woman" two days after Mebruer's disappearance is insufficient to reasonably suggest he was responsible. This insufficiency is underscored and heightened where there is no background given in the motion for the issuance of the subpoena about the source's credibility or connection to defendant. There is no "corroboration through other sources of information [that would reduce] chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." *Gates, 462 U.S. at 244-45, 103 S.Ct. at 2335*; *State v. Williams, 338 So. 2d 1365, 1369 (La. 1976)* (when affidavit that contained no [*127] attestation to reliability of informant, nor disclosed informant's basis for conclusions, it could not support issuance of search warrant). Setting aside the absence of any sworn statements or other indicia of a valid search

warrant, the factors listed in the motion [**37] for the issuance of the subpoena duces tecum did not rise to the level of probable cause.

Having disposed of these initial issues, we now examine whether the evidence from defendant's buccal swabbing is admissible under the inevitable discovery rule. Defendant claims the State failed to prove by a preponderance of the evidence that it would have inevitably discovered his DNA through other unrelated investigations. To the contrary, the State argues each investigation would have inevitably identified defendant as a viable suspect and further posits that defendant may have already been identified as a suspect at the time of the issuance of the subpoena duces tecum.

One of the theories courts use in addressing "fruit of the poisonous tree" issues is the inevitable discovery rule. The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: Because the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States, 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L. Ed. 2d 472 (1988).* A functional similarity exists between the independent source and [**38] inevitable discovery doctrines because both seek to avoid excluding evidence the police "would have obtained . . . if no misconduct had taken place." *Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 2509, 81 L. Ed. 2d 377 (1984).* The State therefore bears the burden of proving by a preponderance of the evidence that "the information

ultimately or inevitably would have been discovered by lawful means ...." *Id.*; *State v. Vigne, 01-2940 (La. 6/21/02), 820 So. 2d 533, 539.* Application of the inevitable discovery doctrine thus "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment . . . ." *Nix v. Williams, 467 U.S. at 444, 104 S.Ct. at 2509 n.5*; *State v. Vigne, 820 So. 2d at 539.*

Integral to the proper application of the inevitable discovery doctrine is a finding that law enforcement would have inevitably secured the evidence by lawful means, not simply that they. could have. Thus, a mere showing that the police had probable cause for a search and could have secured a Warrant from a neutral magistrate does not satisfy the doctrine, because it would effectively obviate the *Fourth Amendment* preference for warrants and reduce the exclusionary [**39] rule to cases in which the police lack probable cause. See *United States v. Elder, 466 F.3d 1090, 1091 (8th Cir. 2006)*("The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs [citing *Murray v. United States, 487 U.S. 533, 108 S.Ct. 2529, 101 L. Ed. 2d 472 (1988)]*. . . . If probable cause alone -- without putting in train the process of applying for a warrant -- were enough to invoke the inevitable-discovery doctrine, that, would have the same effect as limiting the exclusionary rule to searches conducted without probable cause."); see also 6 LaFave, Search and Seizure, § 11.4, at 278-79

(Fourth Ed.) ("Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these [independent] investigative procedures were already in progress prior to the discovery via illegal means, as in Nix v. Williams, or where the circumstances [*128] are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later.").

In the case sub judice, the State asserts law [**40] enforcement was closing in on defendant, various agencies were pursuing him as a suspect, and more leads which drew attention to defendant were coming in daily. The State further contends it would have inevitably acquired the defendant's DNA either by consent or through "surreptitious" means, e.g., by checking defendant's garbage, searching for cigarette butts, soft drink cans, envelopes, disposable plates and utensils. The State contends that through the "quality and quantity of evidence available to the Serial Killer Task Force, Zachary Police, West Feliciana Parish Sheriff's Department, Attorney General's Office, and St. Martin Parish Sheriff's Office was such that each agency [would eventually have] come to regard defendant as a suspect." State brief at 21.

The record shows two lines of criminal investigation involving defendant were underway prior to the issuance of the subpoena duces tecum on May 5, 2003. The first branch consisted of members of the Zachary Police Department and investigators with the Louisiana Attorney General's Office who were investigating the April 27, 1999, disappearance

of Randi Mebruer from her Zachary home, as well as the 1992 murder of Connie Warner.' [**41] Ray Day, a police officer with the Zachary Police Department, testified he had actively investigated Mebruer's disappearance (her body has never been found) from the very beginning and defendant was the main suspect. Dannie Mixon, an investigator with the Attorney General's Office, stated he too had actively assisted the Zachary Police Department in the disappearance of Mebruer and he viewed defendant as the primary suspect since the end of April 1999. It was, because of this continued investigation and the recent information the confidential informant provided that prompted the Attorney General's Office to seek the *art. 66* subpoena duces tecum. Neither the Zachary Police Department nor the Louisiana Attorney General's Office were part of the Multi-Agency Homicide Task Force (Task Force) formed in August 2002.

Independent of the Zachary Police Department and the Louisiana Attorney General's Office, the Task Force was conducting its own investigation after DNA profiles were matched in the Green and Pace murders in East Baton Rouge Parish by Angela Ross and Julia Naylor, two forensic DNA analysts with the Crime Lab. David Smith, a detective with the East Baton Rouge Parish Sheriff's Office, [**42] testified at the hearing on defendant's motion to suppress that a lead was first called in to the Task Force on September 4, 2002, naming defendant as a suspect in the serial killings. That lead was assigned to a member of the Narcotics Division who "closed" the lead at that time because defendant was neither

white nor did he drive a white truck, the two elements then deemed characteristic of the suspected serial killer.

Notwithstanding the earlier "closure", of the lead identifying defendant, the Task Force received a new lead on March 31, 2003, naming defendant as a suspect in the serial killings. At that time, this lead was reopened for two reasons: (1) a sample of the matching DNA evidence acquired in the Green and Pace murders was sent to a Florida lab which determined that several rare markers in the DNA might suggest the suspect was African-American; and (2) while the police canvassed the neighborhood shortly after Carrie Yoder's disappearance on March 3, 2003, the Task Force received reports of a black male [*129] being seen around Carrie Yoder's house shortly before her murder.

Testimony was presented at the suppression hearing that the new tip of March 31 was reassigned to an investigator [**43] who unsuccessfully attempted to contact defendant once. When the investigator could not locate defendant, he left instructions with the West Feliciana Parish Sheriff's Office to let him know when defendant was seen again. The agent, however, had not yet located defendant before the Attorney General's office collected defendant's DNA on May 5, 2003.

These tips that named defendant as a suspect prior to the May 3 issuance of the subpoena duces tecum, though not conclusive in the analysis of inevitable discovery, are significant when placed into the context of the operations of the Task Force. As

the State notes, the evidence showed 26,000 suspects and their corresponding leads were to be investigated and not "closed" until successfully resolved vis-a-vis an alibi that could be established or by the voluntary submission of DNA and the exclusion of that profile when compared against that generated by the State Police Crime Lab. Utilizing that criteria, approximately 18,000 leads had been "closed" at the time of defendant's capture. At the time of the release of the DNA testing that identified the serial killer, the Task Force's new lead on defendant had not yet been closed.

Against that [**44] backdrop, Detective David Smith testified that "but for" defendant's arrest, the Task Force investigator would have worked the lead on defendant until it too could have been cleared by alibi or DNA exclusion. The investigator also testified that in the event consent was not given by a suspect for a DNA sample, and an alibi could not be otherwise established, "that entire team would be dedicated to resolving that lead one way or another." Trial Tr. vol. XXI (Oct. 22, 2004). He further stated DNA could also have been collected by the aforementioned surreptitious means with other leads.

Even though this evidence demonstrates "historical facts capable of ready verification or impeachment" as enunciated in Nix, we need not rest our resolution of the inevitable discovery rule on these facts alone. As the chronology of events unfolded, it is important to remember that although defendant's buccal swabbings were obtained on May 3, 2003, Natasha Poe, the analyst in the State Police

Crime Lab who examined the swabbings, testified at trial that she did not begin her analysis until May 20 because she was out of town, and did not conclude her testing until May 23, 2003. She then reported her findings [**45] immediately to her superior who evidently did not convey them to the Task Force until May 25, 2003.

Two days prior to the release of the Crime Lab's results of the May 3 swabbings of defendant, the investigation leading to the identification of defendant as the south Louisiana Serial Killer by lawful means intensified with the release of Alexander's composite drawing and her son's description of the car he saw in the Alexanders's driveway. Alexander, the only victim that survived the defendant's attack, had provided a detailed description of her July 22, 2002, attacker to the St. Martin's Parish Sheriff's Office and a composite drawing of her attacker was produced. This drawing remained underutilized by the Task Force for nearly a year because the focus of attention was not on an African-American male. After the Task Force's focus broadened, the Task Force met with Alexander on May 22, 2003. At that time, Alexander made a slight adjustment to her original composite with regard to her assailant's hairline. On May 23, 2003, Mary Ann Godwa, the spokesperson [*130] for the Task Force, testified that on May 23 she conducted a noon press conference at the Lafayette Parish Sheriff's Office to release [**46] the sketch of the assailant to the television and press media. After the press conference and over the course of the next day, the Task Force received four different tips referring to

defendant by name and describing his car as a match to the one, Alexander's son described. As can be verified from the record, Alexander's sketch of her attacker, given approximately ten months before defendant's buccal swabbing, bore a striking resemblance to the defendant.

The first new tip came on May 23, 2003, the day of the release of the composite drawing, at 2:24 p.m. The caller, as summarized in the Task Force's event narrative, indicated:

> Thinks she knows the person because of the description of the car, a gold Mirage. He was a Peeping Torn before. She thinks his name is Todd Lee. He is from St. Francisville. He is always in and out of jail. His wife had a type of car . . . they are describing. Not long ago he was charged with a crime similar to breaking in. Call her if you need more information.

Trial Tr. vol. XXI, 5149 (April 22, 2004).

The second tip was received at about 6:16 p.m. on May 23, 2003. The call narrative to the Task Force was summarized as follows:

> Caller works for a local sheriff's [**47] office. He knows someone that has a past criminal history for stalking women from the St. Francisville area. His name is Derrick Lee, about 5'10". The suspect, made the comment that he

> had killed a woman he was dating before. The suspect fits the sketch: He's light-complected, black male. He had a small gold car at one time. He keeps himself up really clean, keeps his hair short, thin mustache and he has a muscular build.

Trial Tr. vol. XXI, 5151 (April 22, 2004).

Another email tip was received on May 24, 2003, at 5:41 p.m. That tip was summarized as follows:

> The event narrative here was he was looking at the picture of the man on the front page of *The Advocate.* His name is Derrick Lee and he lives in St. Francisville. He has a history of being a peeping tom and was the prime suspect in a double homicide in Zachary. Randy Metz with the West Feliciaila Sheriff's Department can tell you more about the case.

Trial Tr. vol. XXI, 5152 (April 22, 2004).

Again on May 24, 2003, a fourth tip was received. Its sun-unary indicated:

> The event narrative here is calling to report a man that fits the description of serial killer. This man has a gold Mirage that is wrecked in the front, and the man that [**48] tried to rape a woman in Breaux Bridge had a gold

> Mirage that was wrecked in the front too. He is the exact same man in today's paper except that his lips need to be a little bit bigger. His name is Derrick Todd Lee and he used to live on Highway 61 right after you pass the truck stop called Southern Belle. The car is parked in front of his mother's house in St. Francisville on Blackmore Road. His whole family lives in that area and he never moved out of the house but just disappeared with wife and kids.

Trial Tr. vol. XXI, 5153 (April 22, 2004).

Although these leads were received on May 24, and May 25 by the Task Force after publication of Alexander's composite sketch and her son's description of the. attacker's vehicle, they were unable to be pursued before defendant's arrest a short time later on May 27, 2003.

[*131] Considering the historical facts that are verifiable, we find the State satisfied its burden of showing by a preponderance of the evidence there was a parallel and independent investigation unrelated to the illegal search that would have inevitably and legally yielded defendant's DNA. When viewed in light of the Task Force's receipt of four rapid-fire tips identifying defendant [**49] by name and make of car after the release of the sketch of the serial killer, it is apparent defendant's apprehension was no longer an object of pure Speculation, but rather a matter of imminent reality.

The tips various citizens called in provided probable cause to arrest defendant as Alexander's assailant. Through the pursuit of this entirely independent investigation based on information entirely untainted by the prior collection of defendant's DNA sample, it is evident the police would have arrested the defendant and would have secured a DNA sample. Thus, the State has shown: (1) there is a reasonable probability the contested evidence would have been discovered by lawful means in the absence of police misconduct; and (2) law enforcement was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. See e.g., *United States v. Lamas, 930 F.2d 1099, 1102 (5th Cir. 1991)*; *United States v. Cherry, 759 F.2d 1196, 1205-1206 (5th Cir. 1985)*; cf. *United States v. James, 353 F.3d 606, 616 (8th Cir. 2093)* (no proof of inevitable discovery given absence of evidence that there was actual, alternative investigation which would have led to discovery [**50] of evidence); *United States v. Procopio, 88 F.3d 21, 27 (1st Cir. 1996)* (inevitable discovery exception applicable when local police would have certainly contacted local agents and secured a warrant on their own); *United States v. Drosten, 819 F.2d 1067, 1071 (11th Cir. 1987)* (inevitable discovery exception applicable when evidence indicated police knew witness's telephone number and were actively pursuing evidence of his name through lawful avenue of discovery when illegal search revealing name occurred); *Davis v. Georgia, 262 Ga. 578, 583, 422 S.E.2d 546, 551 (1992)* (no inevitable discovery found where the State did not show a standard procedure where Warrant would

have been sought following 10-year-old child's telephone call stating that drugs were in house).

In summation, the collection of defendant's DNA constituted a *Fourth Amendment* "search" that would require probable cause, a sworn supporting affidavit, and the issuance of a proper' search warrant. The State's attempt to file a subpoena duces tecum through the use of *LA. CODE CRIM. PROC. ANN. art. 66* was a circumvention of the constitutional mandates for the issuance of a search warrant based upon probable cause. However, [**51] due to the sheer size and complexity of the search for the South Louisiana Serial Killer, other agencies working independently of the Attorney General and the Zachary Police Department received specific tips naming defendant as a suspect both before and after the illegal search. Task Force members testified as to their standard procedure used to pursue every lead and exclude every suspect through alibis and/or DNA analysis. Accordingly, it is clear from the record that law enforcement already suspected defendant, and had an established operational procedure to investigate him at the time the DNA from the illegal search was obtained and matched. Law enforcement then acquired probable cause to arrest defendant and secure his DNA to identify him as Diane Alexander's assailant as well as the other murders. Consequently, defendant's DNA would have been inevitably collected and matched to his victims. Thus the trial court properly [*132] denied defendant's motion to suppress.

Motion for Change of Venue

Defendant contends the trial court's denial of his motion for change of venue based upon the extraordinary media coverage of this case unfairly deprived him of his right to a fair trial by an impartial [**52] jury. Defendant argues this case was extraordinary and the notoriety inherently associated with the search for the South Louisiana serial killer brought into question the issue of whether defendant could receive a fair trial in the Baton Rouge community. Additionally, defendant emphasizes he was tried and convicted just a month before this trial in West Baton Rouge Parish of the second-degree murder of Carolyn Barr Desoto and news coverage of that trial flooded East Baton Rouge Parish. See, n. 8, supra.

On July 17, 2003, defendant filed a motion for change of venue, and supplemented that motion on January 30, February 6, and February 27, 2004. After defendant introduced thousands of print and media stories about the search for the South Louisiana Serial Killer into evidence, the trial court deferred ruling on the motion until after jury selection commenced. Ultimately, on the fourth day of jury selection, the trial court denied defendant's motion for change of venue. As a result of the trial court's deferral of defendant's motion until voir dire examination began, we have the entire record of voir dire examination, approximately nine volumes of the trial transcript involving more than [**53] 100

jurors,[10] to examine whether defendant was able to select a fair and impartial jury.

As provided, in pertinent part, in *LA. CONST. ANN. art. I, § 16*, "Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish where the offense or an element of the offense occurred, unless venue is changed in accordance with law." Concurrent with that right, the law provides for a change of venue when a defendant establishes he will be unable to obtain an impartial jury or a fair trial at the place of original venue. *State v. Blank, 04-0204 (La. 4/11/07), 955 So. 2d 90, 140.*

LA. CODE GRIM. PROC. ANN. art. 622 governs change of venue which provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
>
> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons [**54] are such that

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[10] Voir dire examinations spanned from September 13, 2004 to October 4, 2004.

> they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

In unusual circumstances, prejudice against the defendant may be presumed. See *State v. David, 425 So.2d 1241, 1246 (La. 1983,* ("[U]nfairness of a constitutional magnitude will be presumed in the presence of a trial atmosphere which is utterly corrupted by press coverage or which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of the mob."). Otherwise, the defendant bears the burden of showing actual prejudice. *State v. Vaccaro, 411 So. 2d 415, 423-24 (La. 1982)*; *State v. Adams, 394 So. 2d 1204, 1207-8 (La. 1981)*; *State v. Williams, 385 So. 2d 214, 215-217 (La. 1980).*

[*133] A defendant must prove more than mere public general knowledge or familiarity with the facts of the case to have his trial moved to another parish. *State v. Frank, 99-0553 (La. 1/17/01), 803 So. 2d 1, 16* (no "bright line test for determining the degree of prejudice existing in the collective mind of the community. . . the defendant must show the extent of prejudice in the Minds of the [**55] community as a result of such knowledge or exposure to the case before trial"). A defendant is not entitled to a jury entirely ignorant of his case and cannot prevail on a motion for change of venue merely by showing a general level Of public awareness about the crime. *State v. Clark 02-1463 (La. 6/27/03), 851 So. 2d 1055*; see also *State v. Huls, 95-0541 (La. App. 1 Cir. 5/29/96), 676 So. 2d*

160, 172 (defendant was not entitled to change of venue of murder trial based on pretrial publicity, when thorough voir dire of prospective jurors was conducted, most jurors were questioned individually about their exposure to publicity, and all prospective jurors who could not make unbiased judgment based on their exposure to pretrial publicity and their inability to set aside that information were excused). However, courts must differentiate largely factual publicity from that which is invidious or inflammatory because they present real differences in the potential for prejudice. *State v. Clark, 851 So. 2d at 1071.*

Whether a defendant has made the requisite showing of actual prejudice is "a question addressed to the trial court's sound discretion which will not be disturbed on appeal absent an [**56] affirmative showing of error and abuse of discretion." *State v. Wilson, 467 So. 2d 503, 512 (La. 1985)* cert. denied, *474 U.S. 911, 106 S. Ct. 281, 88 L. Ed. 2d 246 (1985)*; see also *Vaccaro, 411 So. 2d at 424.* Several factors are pertinent in determining whether actual prejudice exists, rendering a change in venue necessary, including: (1) the nature of pretrial publicity and the degree to which it has circulated in the community; (2) the connection of government officials with the release of the publicity;(3) the length of time between the publicity and the trial; (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors

likely to affect the candor and veracity of the prospective jurors on voir dire. *State v. Bell, 315 So.2d 307, 311 (La. 1975)*; see also *State v. Brown, 496 So. 2d 261, 263 (La. 1986)*. Moreover, the jurisprudence shows courts have examined the number of jurors excused for cause for having a fixed opinion as another gauge of whether prejudice exists in the public mind. *Clark, 851 So. 2d at 1071.*

Nature [**57] *of pre-trial publicity:* In support of defendant's motion for change of venue, he filed into evidence over 5,000 pages of printed media reports and newscast transcripts published between July 2002 and January 2004 that related to the South Louisiana Serial Killer. The record also reveals that 123 of 125 potential jurors stated they were at least vaguely familiar with this case through media accounts or informal private conversations. We further observe the trial court only excused 40 jurors (32%) for cause due to their exposure to publicity or opinions of the case. Additionally, defendant challenged 16 jurors for cause. Accordingly, if defendant had been granted all of these challenges, the total percentage of cause challenges would have been 44%. After examining these statistics and surveying prior jurisprudence, we find these numbers consistent with other similarly situated cases in which venue was not changed. [*134] See *State v. Weary, 03-3067 (La. 4/24/06), 931 So. 2d 297, 315* (capital murder defendant not entitled to change of venue based on pretrial publicity; while most of venire had knowledge of case through media sources or through general community knowledge, media coverage was [**58] primarily factual in

nature, record showed that each prospective juror individually was questioned concerning his or her knowledge of the instant case and opinions concerning defendant's guilt or innocence, and while defendant was black and victim was white, prospective jurors' voir dire responses failed to show any indication that race was an issue that community considered); *State v. Frank, 99-0553, 803 So. 2d at 16-17* (change of venue not required when 110 out of 113 venire members (97.3%) "had been exposed to some publicity surrounding the case" and 89% of the prospective jurors indicated that they had been exposed to information about the case on more than one occasion or from multiple sources); *State v. Hoffman, 98-3118 (La. 4/11/00), 768 So. 2d 542, 555* (denial of venue change not abuse of discretion when 72 out of 90 prospective jurors (80%) had awareness of the case before trial and court questioned each prospective juror individually in painstaking detail concerning his or her knowledge of the instant case, and opinions concerning the defendant's guilt or innocence).[11]

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[11] For other cases in which a change of venue was denied see *State v. Connolly, 96-1680 (La. 7/1/97), 700 So. 2d 810, 815* [**59] (although 120 of 139 potential jurors (86%) possessed some knowledge of the crime, most had only a vague recollection of the surrounding facts); *State v. Wilson, 467 So. 2d 503, 513 (La. 1985)* ("Although a majority of prospective jurors (i.e., 24 of 39 or 62%) admitted exposure to pre-trial publicity, only four (10%) were excused for cause on ground of their formation of a fixed opinion."); *State v. Clark, 442 So. 2d 1129, 1133 (La. 1983)* (motion for change of venue granted based on dry run voir dire in which 37 of 38 jurors recalled details of crime and only six out of 24 (25%) jurors in the last two groups questioned indicated that their

knowledge would not affect their decision. whereas 47% conceded prior knowledge would); *State v. David, 425 So. 2d at 1247* (out of 112 jurors, 27 (24%) had read, or heard about the case, but only six of those 27 had an opinion, and all four jurors [3%] who said that they could not put their opinion aside were excused for cause); *State v. Rodrigue, 409 So.2d 556, 559 (La. 1982)* (in a mock voir dire set up in order to determine the impact of media coverage by the court, 26 of 30 prospective jurors had read about the case, but only nine (30%) had fixed [**60] an opinion which satisfied the court that a jury could be chosen in that parish); *State v. Wright, (La App. 2 Cir. 5/9/06), 931 So.2d 432* (of 44 prospective jurors, 15 indicated that they had neither read nor heard anything about the case and while 11 challenges for cause were granted, not all were granted on the issue of media coverage (no more than 22%, and only 6 had formed an opinion regarding guilt); *State v. George, 37,492, 855 So.2d at 871* (of 40 persons questioned during voir dire, only eight (20%) were excused because of the pre-trial publicity and its taint); *State v. Hundley, 99-1156, (La. App. 3 Cir. 3/22/00) 760 So.2d 417, 419* (pretrial publicity' did not taint jury pool to extent that it was impossible for Murder defendant to receive a fair trial, and thus, defendant was not entitled to change of venue, when 15 out of 60 prospective jurors (25%) w ere excused for cause based on pretrial publicity, and defendant used only 11 of his 12 peremptory challenges); *State v. McLemore, 26,016 (La. App. 2 Cir. 6/24/94), 640 So. 2d 847, 855* (no error where 100% of 36 potential jurors had heard or read something about the case and of that number, seven (19%):11 reported that they had [**61] a fixed opinion, and three jurors dismissed for cause (8%) because remaining prospective Jurors demonstrated only a cursory familiarity with the case and all denied that published accounts of the case would affect their ability to apply the law fairly); see also *Mills v. Singletary, 63 F.3d 999, 1011-12 (11th Cir. 1995)* (newspaper articles and television reports about victim's murder and defendant's arrest did not give rise to presumption of prejudice necessary to require change of venue in capital murder case on grounds of pretrial publicity; most newspaper articles did not mention defendant and instead reported on progress of search for victim, articles till mentioned defendant did so in context of reporting unfolding case, there were

[*135] It cannot be gainsaid [**62] that media coverage was extensive from the time of defendant's arrest through his trial. It is also evident that on August 2, 2004, defendant, as more fully detailed in n. 8, supra, was tried and convicted by a jury in West Baton Rouge Parish for the second-degree murder of Geralyn Barr DeSoto. Although DeSoto's murder was not part of the other crimes evidence used in the State's prosecution against defendant in the Pace homicide, it is true that much of the other crimes evidence in the present prosecution was also used in the West Baton Rouge Parish prosecution. It is equally true the media reported the facts of the West Baton Rouge Parish prosecution. Despite media coverage of a defendant's conviction in another case, such coverage does not constitute prejudice as long as the coverage is solely factual and not inflammatory. See e.g., *Snell v. Lockhart, 14 F.3d 1289, 1293 (8th Cir. 1994)*. Defendant has not shown the pre-trial publicity, particularly about his West Baton Rouge Parish conviction, was inflammatory.[12] On the other hand, the record

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no editorials concerning case, and less than 15% of jury venire was excused for bias); *Knapp v. Leonardo, 46 F.3d 170, 177 (2d Cir. 1995)* jury not prejudiced though extensive pretrial publicity resulted in dismissal of 83% of 1,417 venirepersons for cause because jurors questioned regarding publicity only had vague recollection of press coverage and said nothing they might remember would prevent them froth reaching a fair judgment).

[12] The constitutional standard of fairness requires a defendant have a panel of impartial, indifferent jurors. *Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751*

shows time and again during voir in the present case that those jurors who were unable to put pre-trial publicity out of their minds were [**63] excused. Likewise, all the jurors who served on defendant's jury not only assured the court they were able to decide the case against defendant in the Pace prosecution based solely upon the evidence presented at trial, but also they would accord the defendant the presumption of innocence. Finally, the record bears out that the trial court repeatedly admonished jurors from viewing media coverage of the case during voir dire and trial.

Comments of governmental officials: Even though voir dire examination showed almost all prospective jurors were exposed to the case or the several serial killer cases, the comments of government officials were not included in many pretrial articles. As detailed in the State's argument to us, few of the statements officials made included comments by, the East Baton Rouge Parish District Attorney's Office; those comments that the District Attorney's Office

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(1961). To hold the mere existence of any preconceived notion about the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on die evidence presented in court. *Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975)*, citing *Irvin v. Dowd, 366 U.S. at 723, 81 S.Ct. at 1642*. "At the same time, the juror's assurances that he is equal to this task cannot [**64] be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." Id.

did make involved procedure and the court proceedings. Importantly, many of the statements law enforcement officials made were patently inconsistent, especially as they related to the profile of the South Louisiana serial killer.

Length of time between comment and trial: Defendant was arrested in Atlanta, [*136] Georgia on May 27, 2003 and his trial commenced more than a year later on September 13, 2004. It was not until shortly before defendant's arrest that media accounts detailed the DNA evidence and victim's sketches depicting the suspect [**65] as an African-American. In fact, although the first homicide that would be linked to the serial killer investigation occurred on September 24, 2001, for the greater part of the serial killer investigation, law enforcement focused on several suspects, including the delusory "white man in a white pickup truck." As a result, defendant was not the subject of media coverage for a prolonged period of time and publicity involving him was not initiated until his identification and arrest.

Severity and notoriety of the offense: Although the severity and notoriety of the Pace murder was extreme, the current murder trial, when compared with other similar first-degree murder convictions, presents facts that are unfortunately not dissimilar from other like first-degree murder convictions this Court has reviewed. See e.g., *State v. Bowie, 00-3344 (La. 4/3/02), 813 So. 2d 377* (defendant robbed victim over the age of 70 and strangled him with his shoelaces and an electrical cord); *State v. Cosey, 97-2020 (La. 11/28/00), 779 So. 2d 675* (defendant

raped and slashed throat of 12-year-old victim, stomping her face as he left); *State v. Miller, 99-0192 (La. 9/6/00), 776 So. 2d 396* (defendant robbed and [**66] raped 67-year-old woman in her home, then killed her by repeatedly stabbing her, slashing her throat, and dropping a couch on her face); *State v. Tilley, 99-0569 (La. 7/6/00), 767 So. 2d 6* (defendant killed a 68-year-old man by repeated stabbing during the course of an armed robbery in the parking lot of a Burger King); *State v. Robertson, 97-0177 (La. 3/4/98), 712 So. 2d 8* (defendant repeatedly and viciously stabbed two people during a home invasion); *State v. Jones, 474 So. 2d 919 (La. 1985)* (defendant kidnaped 11-year-old victim, beat her, raped her, and choked her to death, eventually dumping her body in a drainage canal).

The area from which the jury was drawn: At the time of the 2000 Census, East Baton Rouge Parish had a population of 412,852. See http://quickfacts.census.gov/qfd/states/22/22033.html (accessed September 25, 2007). The jury pool summoned for this case consisted of 1,300 persons and was far larger than average. As mentioned previously, over 98% of jurors polled had heard something of the case, from either media outlets or acquaintances.[13] The record shows jurors who knew any of the parties or witnesses were not allowed to remain. With a venire pool so large, however, [**67]

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[13] As noted by the West Baton Rouge Parish trial court during the DeSoto case, there was unlikely to be anyone in the state who had not heard of the South Louisiane Serial Killer.

this did not cause a dearth of qualified prospective jurors.

Other community events that either affect or reflect the community attitude toward defendant: The majority of jurors candidly admitted they did not significantly change their lifestyle while the search for the serial killer continued. When queried about the impact of the serial killings, jurors for the most part responded they were more aware of their surroundings and were more cautious when conducting their daily lives. Although defendant emphasizes the Task Force received 26,000 tips, he neither quantifies how many came from East Baton Rouge Parish nor shows how these tips demonstrate a community bias specifically against him. Defendant fails to provide any support for his contention that general public participation in a police investigation automatically equates to venire bias.

[*137] *Factors that likely affect the candor and veracity of prospective jurors:* Our review of the record shows the prospective jurors appeared truthful when questioned directly [**68] and repeatedly on the issue of defendant's guilt, and the clear majority of jurors with a pre-existing opinion stated they were able to put it aside and base their verdict only upon evidence presented at trial.

In summation, considering that less than one-third of the prospective jurors were excused because of their inability to put aside their pre-trial exposure, defendant fails to demonstrate in the context of the other *Bell* factors that the undoubtedly

high press coverage of the investigation was sufficient to alter the "candor and veracity" of the jurors's answers during voir dire examination. In fact, several jurors expressed their lack of enthusiasm for serving on the jury, despite their willingness to do so if called upon. The ever-changing profile of the serial killer, and the public perception of rampant mistakes in the investigation during the search for the serial killer would work as much in favor of defendant as the publicity would work against him. As we have previously observed, "the mere existence of any preconceived notion as to the guilt or innocence of the accused, without more, is insufficient to rebut the presumption of the juror's" impartiality." *State v. Clark, 851 So.2d at 1071.* [**69] Defendant fails to show the existence of pretrial publicity was such that it would color the jurors' voir dire responses to the point of making them unreliable and that he was therefore deprived of his right to trial by a fair and impartial jury. After carefully reviewing the record of this matter, defendant failed to show the trial court abused its discretion in denying his motion for a change of venue.

Defense funding

Defendant next contends the trial court denied him adequate funds to mount a defense and deprived him of effective assistance of counsel. Specifically, defendant claims the $ 37,000 he received was far less than the $ 216,000 needed to secure several necessary experts. With the refusal of more funding, defendant claims he was deprived of the "raw materials integral to the building of an effective

defense." *Ake v. Oklahoma, 470 U.S. 68, 78, 105 S.Ct. 1087, 1093, 84 L.Ed.2d 53 (1985).* Additionally, defendant argues the trial court erred when it failed to consider the heavy caseloads under which defendant's trial counsel labored.

From the outset, we note that at a hearing on "expert funding, whether ex parte or contradictory, defendant has the burden to show a need for the [**70] funding by establishing with a reasonable degree of specificity what type of expert is needed and the purpose for which the expert is required. *State v. Touchet, 93-2839 (La.9/6/94), 642 So. 2d 1213, 1221.* He must show it is more likely than not the expert assistance will be required to answer a serious issue or question raised by the State's or defense's theory of the case, and that denial would result in an unfair trial. *Id., 642 So. 2d at 1221.* If this burden is met, the trial court is to order the state to provide those funds. Id. A reviewing court examines a denial of funding under the abuse of discretion standard. See e.g., *State v. Phillips, 05-1338 (La. App. 1 Cir. 3/29/06), 934 So. 2d 162, 165* (finding the trial court did not abuse its discretion in denying the request for funds for a psychiatrist and a psychologist).

In the present case, the trial court denied defendant's request for funding in the following particulars: (1) a penalty phase investigator to controvert "the ongoing persuasive campaign for [defendant's] [*138] execution" and to develop a claim of mental retardation; (2) a blood spatter expert to have proper analysis performed on crime scene blood evidence; (3) a fingerprint [**71] expert

to match all prints taken from the Pace and Green murder scenes and point out problems with the State's fingerprint evidence; (4) a private investigation service to investigate the 26,000 other suspects in the serial killer investigation; (5) a venue consultant to assist in a motion to change venue; and (6) an eyewitness identification consultant to counter "four very dubious identifications apparently made of Mr. Lee in one of the cases against him." Although the trial court granted defendant $ 37,000 for a pathologist, a serial killer expert, a social worker, a tool mark expert, a psychologist, and DNA experts, he claims the award was woefully inadequate. The trial court also directed defendant to file with the Louisiana Indigent Defense Assistance Board to obtain more funding if the grant was insufficient. It appears no other funding was found.

After reviewing this voluminous record, it is clear defendant's DNA was conclusively linked to the body of the victim. There is nothing a blood spatter expert, fingerprint expert, private investigator, or eyewitness identification expert could have opined that would counter that fact. Defendant never alleged victim consent. As for the [**72] penalty-phase investigator, defendant was granted funds for two mental health experts to help establish mental retardation, namely psychologist Drew Grouvier and psychiatrist Sarah Deland. As discussed at length above on the issue of change of venue and the application of the Bell factors, an expert would not have altered the trial court's determination that venue was proper.

As to trial counsel's attempt to be relieved because of a burdensome caseload that would render his assistance ineffective, defendant failed to demonstrate counsel labored under such a workload. In stark contrast to this assertion, defendant's brief reproduces a statement the trial court made noting defendant "has two - over two attorneys. I know one is just helping out and may not be full-time with them, but nevertheless, he is here to help." Trial Tr. vol. XVI, 3948 (Aug. 25, 2003). Testimony was also adduced that defendant's lead counsel's caseload consisted of two cases, including defendant. Defendant refers to nothing in the record to support his contention trial counsel's workload prevented him from properly representing defendant. Compare *State v. Peart, 621 So. 2d 780 (La. 1993)* (excessive caseloads and [**73] the insufficient support with which their attorneys must work may result in failure to provided effective assistance of counsel); see also e.g., *State v. Robinson, 01-1305 (La. App. 4 Cir. 4/17/02), 820 So. 2d 571, 582*, writ denied, *02-1640 (La. 5/31/03), 845 So. 2d 1068* (relator failed to establish denial of effective 'assistance of counsel because his trial counsel had a heavy caseload, absent any specific evidence to substantiate his claim). After reviewing defendant's argument and the record of this case, we find this assignment of error lacks merit.

Guilt Phase

Other Crimes Evidence

Defendant next asserts the trial court's admission Of other crimes evidence during the State's case-in-chief violated his due process rights.

In addition to presenting evidence of the charged crime involving Charlotte Murray Pace, the State also placed evidence before the jurors of four other homicides and one attempted homicide committed by the defendant: Gina Wilson Green, who died on September 24, 2001, at home (three doors [*139] down from Pace's former residence) in her bed from manual strangulation; Pamela Piglia Kinamore, who had been kidnaped from her Baton Rouge home at night on July 12, 2002, whose [**74] body the police found four days later dumped in Whiskey Bay with her throat cut; Carrie Yoder, kidnaped from her Baton Rouge home on March 3, 2003, whom the police found 10 days later also dumped in Whiskey Bay, approximately "one mile away from where Kinamore's body had been recovered, a victim of manual strangulation; Trineisha Dene Colomb, abducted from her car on November 2, 2002, in Scott Louisiana (Lafayette Parish), whose body the police found on November 24, 2002, bulgeoned to death, in a wooded are some distance away from her abandoned vehicle; and Diane Alexander, who survived an attack in her Breaux Bridge home on July 9, 2002, by an assailant who tried to rape and strangle her and then fled the trailer when her son arrive home and interrupted the attack. Sexual assault kit testing indicated that Yoder, Kinamore, and Colomb had also been victims of sexual assault. Dr. Alfredo Suarez, a medical expert, reviewed

pictures taken during the Green autopsy and opined that Green, too, was the victim of sexual assault.

Generally, courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. However, [**75] the State may introduce evidence of other crimes if the State establishes an independent and relevant reason, i.e., to show motive, opportunity, intent, or preparation, or when the evidence relates to conduct which constitutes an integral part of the act or transaction that is the subject of the present proceeding. *LA. CODE EVID. ANN. art. 404(B)(1)*. Nonetheless, the State must provide the defendant with notice and a hearing before trial that it intends to offer prior crimes evidence. *State v. Prieur, 277 So. 2d 126, 130 (La. 1973)*. Additionally, the State must prove the defendant committed the other acts. *LA. CODE EVID. ANN. art. 1104*; *Huddleston v. United States, 485 U.S. 681 690, 108 S.Ct. 1496, 1501-1502, 99 L.Ed.2d 771 (1988)*; *State v. Crawford, 95-1352 (La. App. 3 Cir. 4/3/96), 672 So. 2d 197, 207-208*, writ denied, *96-1226 (La. 10/4/96), 679 So. 2d 1379*. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *State v. Hatcher, 372 So. 2d 1024, 1033 (La. 1979)*; *State v. Sutfield, 354 So. 2d 1334. 1337 (La. 1978)*; *State v. Jackson, 352 So. 2d 195, 196 (La. 1977)*; [**76] *State v. Ledet, 345 So. 2d 474 (La. 1977)*. However, the jurisprudence has established an exception to the general inadmissibility of other crimes evidence to

include evidence that shows modus operandi, particularly when the modus operandi employed by the defendant in both the charged and the uncharged offenses is so peculiarly distinctive one must logically say they are the work of the same person. See e.g., *State v. Code, 627 So. 2d 1373, 1381 (La. 1993)* (other crimes evidence admissible where they show similar distinctive handcuff ligature, overkill, predominant use of a knife, and need for domination and control of the victims to the extent of moving them from room to room). Lastly, the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *Hatcher, 372 So. 2d at 1033.*

In all, with testimony from investigating detectives, forensic DNA experts, and various other witnesses, the other crimes evidence in the present case is spread over 600 pages of testimony, slightly over half of all of the testimony presented during the guilt phase. As in the Pace [*140] homicide, the State principally utilized DNA evidence to connect defendant to all the other homicides. [**77] Three of the connections were made by DNA experts with the Louisiana State Police Crime Laboratory (as in the Pace homicide), i.e., Angela Ross (for the Green case), Julia Naylor (for the Kinamore case; she was also the forensic expert who matched defendant's DNA to the samples taken from Pace's body) and Natasha Poe (for the Yoder case; Poe also made the match of defendant's buccal sample to the known profile of the South Louisiana Serial Killer). In Dene Colomb's case, Carolyn Booker with the Acadiana Crime Laboratory made the fourth match.

Additionally, the State relied upon two pieces of circumstantial evidence to connect the defendant to Yolder's murder and the attack on Alexander. The first was provided by a representative of Cingular Wireless in Carrie Yoder's case. Cingular's computer records showed defendant used a phone card to place two calls on March 3, 2003. These calls were captured and relayed along Cingular's network line by two of its cell phone towers outside Ramah and Grosse Tete, Louisiana, from I-10, near Whiskey Bay where Yoder's body was recovered. The second item of circumstantial evidence involved the telephone cord used in the attack on Diane Alexander. See [**78] infra.

Although the State mentioned during opening argument that some DNA evidence from the attacker's sweat had been recovered from the dress Diane Alexander was wearing at 6e time she was attacked, the State ultimately elected at the close of the evidentiary portions of trial not to introduce this piece of scientific evidence. Thus, the State relied solely on the eyewitness identification Alexander made of defendant, first in a photographic lineup emailed to her brother's home in Kentucky where she had sought refuge after the Task Force published her composite drawing of her assailant, and then in open court as she testified at trial. Alexander's son, Herman, who saved her life by fortuitously interrupting the assault as defendant was tightening a phone cord around his mother's neck, corroborated her testimony by identifying defendant's Mitsubishi car parked outside their mobile home when he arrived there. In addition, he

noticed a phone cord dangling out of one of the windows as the attacker's vehicle sped from the scene. The cord was later recovered at Whiskey Bay several hundred feet away from the body of Pam Kinamore, who died only two days after the-attack on Alexander. Mark [**79] Kurowski of the Acadiana Criminalistics laboratory, art expert in tool mark identification, matched the cut phone cord found inside the trailet after the assault ended to the telephone cord found near Kinamore's body at Whiskey Bay. Alexander's testimony further indicated she too had been the intended victim of a sexual assault, interrupted not only by the arrival of her son but also, initially, by defendant's inability to sustain an erection.

On the basis of extensive testimony adduced from numerous witnesses at a pre-trial hearing held on January 14 and 15, and March 30, and 31, 2004 the trial court ruled the other crimes evidence involving Green, Kinamore, Colomb, Yoder and Alexander was admissible "for the purpose of identity, motive, plan, system, and intent." Defendant unsuccessfully sought review of that ruling in this Court. *State v. Lee, 04-1112 (La. 6/4/04), 876 So. 2d 77.* As stated elsewhere in this appeal, this Court's pre-trial writ denial does not preclude reconsideration of the issue on the basis of the full trial record. *State v. Fontenot, 550 So. 2d 179 (La. 1989).*

In brief, the defendant attacks the introduction of all of this evidence primarily on grounds that the only [**80] conceivable [*141] rationale for introducing the other crimes evidence in this case was on the sole contested issue at trial, i.e., the

identity of Charlotte Pace's assailant. Defendant contends the circumstances of the other crimes were not sufficiently similar to establish a signature or modus operandi identifying the perpetrator in the charged and uncharged crimes as the same man.

Defendant contends the State presented evidence of other crimes of such "quantity and quality," as to eviscerate any hope that he could receive a fair adjudication. At issue is not whether defendant committed the other crimes,[14] but whether, as urged by the defendant, that admission of the evidence at trial was unduly prejudicial because it served no other purpose than to show the bad character of defendant, and not a larger and legitimate purpose of establishing motive, intent, system, or plan. The crimes, defendant claims, were so dissimilar that to present them to the jury inevitably resulted in undue prejudice. Defendant contends the 'evidence of the murders and one attempted murder the State introduced, including gruesome crime scene photographs and alleged testimony of the victims' good character, was [**81] not indicative of the modus operandi, plan, motive, or identity in the instant murder.

FBI Agent Mary Ellen O'Toole, an expert in criminal investigative analysis, testified for the State at the Prieur hearing about the victims' similarities and how they demonstrated a consistent modus operandi. Her analysis indicated all the

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[14] At no time in brief or in argument before us does the defendant contend the evidence was insufficient to prove the other crimes relied upon by the State.

victims were attractive, successful adult women. All the victims had "low-risk" lifestyles that would not likely put them situations in which they could become a victim of violent crime. Moreover, all the victims were alert and not incapacitated at the time their attacks began, and each had recently traveled in the area. O'Toole noted the first confrontation by the victims' attacker was in a "comfort zone," most being in or near their homes. There were no signs of forced entry in any of the attacks. Each victim appeared to be disarmed nonviolently, with the attacks beginning only after they were subdued. All the victims were moved around their "comfort zones" during the attacks, and none of the victims appeared [**82] to have provoked their assailant's violence and anger.

O'Toole observed the perpetrator attacked each victim in a "high-risk" manner: first, the attacks occurred at times of the day when others could have been around; secondly, the killer's behavior was impulsive and directed at "low risk" victims, as opposed to "easier targets" like hitchhikers or prostitutes. O'Toole also found the attacks exhibited a very consistent pattern which exemplified the attacker's need for high risk, high thrill, and a sexual assault. To underscore her observation about the attacker, O'Toole noted there were neither signs of burglarious intent in any of the crime scenes nor any signs of remorse.

At the Prieur hearing, defendant emphasized the dissimilarities between the victims to counter the State's contention. He pointed out Pace died from exsanguination after being stabbed 81 times. Gina

Wilson Green and Carie Yoder were asphyxiated, Pamela Kinamore had her throat slashed, Trineisha Dene Colomb was bludgeoned to death, and Diane Alexander was being strangled when her attacker was scared off by the sudden arrival of her son. In stark contrast to defendant's assertions, it was the State's contention at the [**83] Prieur hearing that defendant chose. Pace for the same reasons [*142] he chose his other victims, but Pace may have put up a bigger "fight," one that defendant did not expect. As a result, the crime scene was more chaotic and the murder was more brutal than the other victims.

When confronted with defendant's contentions, O'Toole explained that the difference in Pace's murder resulted from defendant's perceived loss of control during the attack. She theorized that if Pace had backed off or attempted to escape her attacker, a different crime scene would have resulted. However, O'Toole opined this change did not mask the other consistent traits she found prior to the attack. Additionally, O'Toole stated all but one murder victim (Dene Colomb) died of wounds received to the neck.

The record shows the State introduced photographs of the victims and the crime scenes to illustrate the similarities of the physical injuries of each victim and their respective crime scenes. Moreover, the State elicited victim character testimony at trial to establish the background of each victim, to show their movements immediately before the attack, to demonstrate chain of custody of evidence, and in some instances, [**84] to show the

condition of the crime scene when it was first encountered.

In addition to Agent's O'Toole's expert assessment of the commonality of these other crimes, there was one distinctive aspect od the four homicides involving Green, Kinamore, Yoder, and Colomb. As the DNA analyses shows, defendant left behind his distinct genetic signature in all four cases by depositing his virtually unique genetic material on the blouse worn by Gina Wilson Green at the time she died and on a towel in her home and in the bodies of Kinamore, Yoder, and Colomb.

Four analysts independently worked on the DNA matches. Three of the analysts, Ross, Naylor, and Poe, were employed by the same State Police Crime Lab police, but they worked from separate work stations with different computers, the fourth analyst, Booker, worked for a separate crime lab. The consistency of the DNA results, when viewed in the Context of crimes involving Green, Kinamore, Yoder, and Colomb, not only produced a portrait that resembled the single attacker Agent O'Toole discussed, it also provided jurors an observable basis for concluding nothing was amiss with the DNA analysis of the samples in the Pace homicide. Moreover, the consistency [**85] of the DNA analyses in these other crimes further provided jurors with an experiential foundation t6 reliably identify defendant as Pace's assailant. To this extent, the State's other crimes evidence addressed any reluctance jurors might otherwise have had in returning a verdict based wholly on scientific evidence.

Furthermore, although the State ultimately chose not to present DNA evidence in the case of Diane Alexander, her eyewitness testimony, as partially corroborated by the testimony of her son who fortuitously interrupted the crime and saved her life, removed the issue of identity from the realm of abstract scientific analysis and statistical probabilities and presented it in a manner jurors could assess for themselves on the basis of their own experience -- live testimony in court from witnesses whose demeanor they could observe as they responded to questions posed by the State and cross-examined by the defense. In turn, the eyewitness evidence Alexander provided was probative on the issue of defendant's identity in the Pace homicide because it also provided jurors with a basis to conclude that, given the similarities in the crimes Agent O'Toole discussed, the scientific test [**86] results correctly identified Pace's assailant.

[*143] Accordingly, although the State's presentation of other crimes evidence occupied half of the guilt phase of trial, the State used this evidence against the defendant, not by asking jurors to convict defendant because of his criminal propensities, but on the basis of the genetic markers he left behind in a variety of similar circumstances over the course of a year. These genetic markers unmistakably identifying defendant as the assailant

who claimed the life of Charlotte Murray Pace.[15] Accordingly, this assignment of error lacks merit.

Penalty Phase

Defendant's Mental Retardation Claim

In his first penalty phase argument, defendant contends he established by a preponderance of evidence that he is mentally retarded. Thus, he contends the imposition of capital [**87] punishment violates the *Eighth Amendment to the United States Constitution.*

In *Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)*, the United States Supreme Court held that execution of mentally retarded persons constitutes an excessive punishment, and thus violates the *Eighth Amendment*. This Court addressed Atkins in *State v. Williams, 01-1650 (La. 11/1/02), 831 So. 2d 835, 861*, and directed trial courts in post-Atkins hearings:

> 1) to order a pre-trial evidentiary hearing on the issue of mental retardation when the court has 'reasonable grounds' to believe a

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[15] Cf. *Old Chief v. United States, 519 U.S. 172, 187, 117 S. Ct. 644, 653, 136 L.Ed.2d 574 (1997)*("Evidence . . . has force beyond any linear scheme of reasoning, and as its piece come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of juror to draw the inferences, whatever they may be, necessary to reach an honest verdict.")

> defendant is mentally retarded, *[La.C.Cr.P.] art. 643* 2) to hold the hearing before a judge, not a jury; 3) to require the defendant to prove by a preponderance of the evidence that he meets the criteria established in Louisiana's statutory definition of mental retardation, *LSA-28:381* [defining retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior, and Manifested during the developmental period"].

In response to Atkins and Williams, the Louisiana Legislature enacted 2003 LA. ACTS 698, which created *LA. CODE CRIM. PROC. ANN. art. 905.5.1.* [**88][16] The code article provides for a

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[16] Defendant claims that *LA. CODE CRIM. PROC. ANN. art. 905.5.1* is unconstitutional in that it calls for a jury to make the determination of mental retardation rather than through a pre-trial determination by the court. Moreover, defendant claims the guilt phase verdict form and jury instructions created an unacceptable risk that individual jurors were prevented from finding mental retardation existed because the jury was required to find retardation unanimously.

As an initial matter, this Court has already throughly addressed the claim that *LA. CODE CRIM. PROC. ANN. art. 905.5.1.* is unconstitutional [**89] and found it without merit. *State v. Turner, 05-2425, p. 12 (La. 7/10/06), 936 So.2d 89, 99* ("[n]either Atkins nor other controlling legal principles compel the selection of a specific fact finder regarding mental retardation or require the determination be made at a specific point in the

procedure used in the event a defendant raises a claim of mental retardation. Under the article, [*144] such a defendant has the burden of proving mental retardation by a preponderance of the evidence. *LA. CODE CRIM. PROC. ANN. art. 905.5.1(C)(1).*[17] The article defines mental retardation as:

> a disability characterized by significant limitations' in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The onset must occur before the age of eighteen years.

LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1).

The article concludes with an advisory list of several medical conditions which "do [] not necessarily constitute mental retardation." *LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(2).*

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adjudication process.").

As to the jury instructions, defendant failed to object to it and thus waived the claim here. *LA. CODE CRIM. PROC. ANN. art. 801 (C); LA. CODE CRIM PROC. ANN. art. 841; State v. Draughn, 950 So. 2d at 622* (applying *LA. CODE CRIM.PROC. ANN. art. 801 (C)* to claims of jury instruction error); *State v. Wessinger, (La. 5/18/99), 736 So. 2d at 180* (applying contemporaneous objection rule to penalty phase errors short of rule 28 arbitrary facts in penalty phase of a capital trial).

[17] In a significant departure from the procedure established by this Court in *Williams*, the new legislation calls for a jury to determine whether a defendant is exempt from capital punishment by reason of mental retardation.

Included [**90] in the list are mental illness, organic brain damage occurring after age 18, learning disabilities, speech and language disorders, and personality disorders. Id. In Atkins, the United States Supreme Court also suggested factors to consider for the determination of mental retardation:

> clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18. Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies [**91] do not warrant an exemption from criminal sanctions, but

> they do diminish their personal culpability.

Atkins, 536 U.S. at 318, 122 S.Ct. at 2250-51.

In the present case, defendant contends the record preponderates he is mentally retarded and not subject to execution. Defendant claims the test results of a Wechsler Adult Intelligence Scale, 3rd Revision (WAIS III) and placement on the Vineland Adaptive Behavior Scale show him mildly mentally retarded.. Dr. Drew Gouvier, a board-certified psychologist and neuropsychologist at Louisiana State University testified he found defendant mildly mentally retarded after interviewing defendant for about two hours, and his wife and mother for about two to three hours.[18] To support this claim, Dr. Gouvier stated defendant's full-scale WAIS score was 65, and that the Vineland test revealed deficits in communication/language[19] and capacity [*145] for self-direction. Graduate students administered the tests. Dr. Gouvier also testified defendant's mental retardation onset occurred before the age of 22, and likely started when he was in grammar

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[18] Dr. Grouvier admitted there were aspects of defendant's psychological history he was given that were impossible to verify and that was possible he could get a false impression of defendant's history from his wife and mother. Dr. Sarah Deland, a forensic psychiatrist, noted a similar motivation of family members to be less than truthful in thier testimony.

[19] His communications deficit was not "grossly" deficient. Furthermore, on another test, defendant was scored as having an IQ of 81. That test, however, had a lowest possible score of 80, and was said less reliable.

school, where he was in special education classes and had speech therapy. Dr. Gouvier further placed defendant in the [**92] bottom 2nd percentile relative to his deficiencies. However, he only examined some of defendant's work and school records. Although Dr. Gouvier conceded not every person with an IQ below 70 is mentally retarded, he opined that it is skill deficits that are determinative of the issue. We note, however, in conflict with his stated opinion, Dr. Gouvier found defendant displayed "excellent skills" in the areas of community living and mobility.

Dr. Sarah Deland, aboard-certified forensic psychiatrist employed with Tulane University, also examined defendant. She interviewed defendant for a total of six hours, and at first was [**93] unsure if defendant had suffered a brain injury or was mentally retarded. She testified she interviewed defendant with a skeptical eye, as she did with all the criminals she examined. While she did not administer any psychological examinations, she opined with reasonable medical certainty that based on the results of Dr. Gouvier's tests and her interviews, defendant is mildly mentally retarded. She observed several behaviors that are consistent with someone who is mentally retarded: an inability to remember the chronology of past events; a tendency to repeat themselves frequently; and the inability to understand abstract concepts. Dr. Deland concluded her observations of defendant and conversations with his wife and mother were consistent with the school and work records she reviewed the psychiatrist also opined it was likely

defendant's story of paying someone to take the commercial driver's license examination for him was truthful as it was "an outlier" when compared with his other examination performances. She also observed defendant had a history of violence toward women.

In response to defendant's witnesses, the State presented two lay witnesses and two expert witnesses. The first [**94] lay witness was Patrick Lawless, a former co-worker, of defendant. Lawless testified defendant was a skilled "Class B Pipefitter" with whom he worked for approximately a year. Lawless testified defendant occasionally read and understood blueprints, and he had no difficulty conversing with co-workers. In short, defendant was "a regular guy" who liked to barbeque, party, and enjoy himself. In Lawless's lay opinion, defendant did not appear retarded in his interactions with him. Gary Robillard, a former supervisor of defendant, testified similarly. He stated defendant was a good employee who could read blueprints, and he was easy to talk to. Defendant began as a entry-level pipe fitter, progressed at work, and "was on his way" to being a "Class-A Pipefitter."

Dr. Donald G. Hoppe, a board-certified psychologist, testified for the State. Dr: Hoppe spent approximately two hours interviewing defendant and a little more time observing him before and after that interview. Dr. Hoppe also reviewed Dr. Gouvier's report and raw data, and found the WAIS administration adequate. However, Dr. Hoppe concluded defendant is in no way mentally retarded. He based his professional opinion on his

interpretation [**95] of the WAIS results, interpreting them differently than Dr. Gouvief, and in Dart because of his review of defendant's school records. Succinctly stated, Dr. Hoppe testified one's IQ ranges over any period of time, and that the results presented by Dr. Gouvier and his students were only 66% reliable. In Dr. Hoppe's opinion, to [*146] achieve a 95% level of confidence, the range must be expanded to place defendant's IQ somewhere between 62 and 70 at any given time. Dr. Hoppe continued that school IQ testing would provide a better analysis of defendant's IQ over time. After averaging nine IQ tests occurring between grades one and six, Dr. Hoppe found defendant had an average IQ as a child of 75.5, well over the clinical definition of mild retardation.[20] In his evaluation of defendant's mental retardation claim, Dr. Hoppe also looked to defendant's 91 % passing grade on his DOTD commercial drivers; exam, and his 88% final average from truck driving school. He also pointed out defendant averaged 79% in his work-related safety training exams. Looking at the totality of the information available to him, Dr. Hoppe concluded defendant qualified under no definition of mental retardation.

Next, the State called Dr. Robert Blanche, a board-certified psychiatrist working out of East Baton Rouge Parish Prison, to the stand. Dr. Blanche testified that after meeting with defendant

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[20] It should [**96] be noted one of the component scores of the average IQ was a 91, achieved after defendant repeated the fourth grade.

for about three hours, and reviewing all data and interviews collected by others, he determined defendant was not mentally retarded.

Viewing defendant's' assertions in light of the lay and expert testimony, we observe defendant's examples of mental retardation can just as easily be interpreted as a combination of malingering in front of testers and illiteracy or a learning disability. See *LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(2)(j), (p)* (learning disabilities and speech and language disorders do not necessarily constitute mental retardation).

An examination of the attacks on Green, Pace, Alexander, Kinamore, Colomb, and Yoder reveals one common thread among defendant's attacks -- none of the crime scenes showed any signs of forced entry. An examination of Diane Alexander's testimony sheds light on the proposition that forced entry was unnecessary because defendant was a "smooth [**97] taker" and a charming man. Alexander testified that when she responded to the knock on the door of her mobile home, she found standing in front of her a neatly dressed African American male, clean shaven, but with a thin mustache, and groomed with a fresh haircut with a "neat razor line." The man introduced himself as "Anthony" and explained he was "supposed to be doing construction for some people in the area by the name of Montgomery." Alexander immediately assumed "he was lost because he was confident when he spoke." The man asked Alexander whether her husband knew the whereabouts of the Montgomerys, and when she said, "No," he then asked for a

telephone book and a phone. Alexander gave him her cordless phone and a phone book and closed the door behind her. After a few minutes, she reopened the door to retrieve her phone. The man heard gospel music Alexander was playing that morning and told her he sang with a gospel choir. He continued to make small talk with Alexander and asked again whether her husband knew; where the Montgomerys lived. This time, Alexander responded, "Look...my husband is not home." With that, defendant bulled his way through the door and launched his brutal attack [**98] on Alexander.

Thus, as described by Alexander, defendant's conduct was scarcely that of a man suffering from significant adaptive skills impairments. Instead, defendant demonstrated [*147] he was capable of communicating with Alexander in such a way as to put her at ease until determining her husband was not home and he could easily overpower her with his considerable physical strength.

This is further evidenced by the fact defendant maintained two households during the time of the killings, one for his wife and children and one for his girl friend. The same is true when we examine defendant's encounter with the Zachary Police Department and the Attorney General's representatives when they obtained buccal swabbings from him. At that time, defendant did not simply accept the officers's assertion they had a subpoena duces tecum, he asked them for the court order authorizing the subpoena. Similarly, a reading of the transcript of defendant's interrogation shortly after his arrest in Atlanta reveals a person who

stealthily dodged questions, formulated answers that were short on incriminatory statement, and long on talk about the possibility, of book deals based upon the serial murder case. In the [**99] end, reality belies defendant's present claim he has communication skills that fall in the bottom two percentile.

Merely because defendant wrote "okay, thanks" in response to a teacher evaluation, does not equate to retardation or an inability to communicate. Those people who worked with defendant on a daily basis testified he appeared like a regular guy and he had no difficulty working or speaking. Defendant's ability to successfully pass an oral drivers test, but fail a written commercial drivers test, is as easily explained by an inability to read as it is minor mental retardation. The complexity, scope, planning, and relative skill with which defendant committed a string of violent murders aid evade capture contradicts any claim he is somehow "slow" and unable to grasp abstract concepts as Dr. Deland testified. Defendant displayed a survival mentality with great assuredness time and again when he took great lengths to cover up his, crimes and hide evidence. Defendant escaped detection and capture for nearly two years while he committed a series of gruesome murders. Defendant's placement in special education during grammar school is also not necessarily indicative of retardation. [**100] His poor academic performance is again just as easily explained by a learning disability as it is mental retardation.

The jury heard expert and lay witnesses from both the State and defense. The jury's unanimous decision that defendant is not mentally retarded, and thus that he failed to carry his burden of proof, is neither irrational nor arbitrary. LA. CODE GRIM. PROC. ANN. *art. 905.5.1(C)(1).* Defendant failed to show "significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills" *LA. CODE CRIM. PROC. ANN. art. 905.5.1(H)(1).* This claim fails.

Capital Sentence Review

Under *LA. CODE CRIM. PROC. ANN. art. 905.9* and LA. S. CT. Rule 28, this Court reviews every sentence of death imposed by Louisiana courts to determine if it is constitutionally excessive. In making this determination, the Court considers whether the jury imposed the sentence under the influence of passion, prejudice or other arbitrary factors; whether the evidence supports the jury's findings with respect to a statutory aggravating circumstance; and whether the sentence is disproportionate, considering both the offense and the offender.

The [**101] district judge in the present case has filed the Uniform Capital Sentence Report ("UCSR") required by LA. S. CT. RULE 28 § 3(a) and the Department of Public Safety and Correction submitted a [*148] Pre-sentence Investigation Report ("PSI"). See LA. S. CT. RULE 28 § 3(b). In addition, the State filed a Sentence Review Memorandum.

Those documents indicate the defendant, Derrick Todd Lee, is an African-American male born on November 5, 1968 in Baton Rouge. He lived in St. Francisville for most of his life. He is married, and has three children. However, Lee and his wife have had a tumultuous relationship for many years, and there have been reports Lee beat her on occassion. He also had a longtime girl friend with whom he kept a separate household, and with whom he also was physically violent. Although both his parents are still alive, he was primarily raised by his mother, on whom he was overly dependent. He also developed a close relationship with his stepfather, and did not meet his biological father until he was 21 years of age. Lee has 13 siblings and half-siblings, but the families are split along lines of paternity.

A self-described loner in his childhood, Lee performed poorly in school, [**102] had chronic asthma, and underwent speech therapy. He was enrolled in special education classes for the majority of his schooling. Lee completed the eleventh grade before dropping out. Lee has apparently never obtained a GED.

After dropping out, Lee went through a succession of jobs as a pipe fitter, sandblaster, painter, boiler maker, tool lifter, and cement finisher. Lee also obtained a commercial driver's license and drove a truck hauling chemicals for six months.

Defendant has an extensive criminal history, and has spent periods of his life incarcerated. Lee's only juvenile offense was a conviction for simple burglary

in 1981. As an adult, defendant was convicted of: (1) attempted unauthorized entry of an inhabited dwelling (1988, one year at hard labor, suspended and placed on two years of probation); (2) disturbing the peace (1990, bench probation for one year); (3) simple burglary of an inhabited dwelling (1992, four years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for one year); (4) "Peeping Tom," resisting arrest by flight, and criminal damage to property (1995, six month suspended sentence with two years of bench probation); (5) [**103] two counts of "Peeping Tom" (1997, two years supervised probation);. (6) stalking (1999, six month suspended sentence, two years supervised probation that was ultimately revoked); and (7) aggravated flight (2000, two years imprisonment at hard labor).

Defendant has been positively linked to the murders of several women in south Louisiana, and is strongly suspected of being responsible for the murders of many more. At trial Lee was also shown responsible for the attempted murder and attempted aggravated rape of Diane Alexander in Breaux Bridge, Louisiana.

Passion, Prejudice, or Other Arbitrary Factors

The record does not provide any indicia of passion, prejudice, or arbitrariness. Defendant, an African-American male who was 33-years of age at the time of the offense, raped and killed a 22-year-old woman. Additionally it was proven he was responsible for the deaths of at least four other

women, and the aggravated rape and attempted murder of another. He received a unanimous sentence of death from a unanimous jury of 12 persons. A jury of twelve persons was presented with credible evidence in addition to defendant's behavior that led them to reject his mental retardation defense and to return [**104] a verdict of death. No prejudice is apparent.

Aggravating Circumstances

The jury returned the verdict of death, after finding Charlotte Murray Price died [*149] during the commission of an aggravated rape or attempted aggravated rape. *LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1)*; see *Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)*; see also Trial Tr. vol. XII, 2919 (Oct. 14, 2004) (penalty phase verdict form). As discussed supra, the aggravating circumstances relied upon by the State were fully supported by the evidence. Defendant's DNA was found in and on the victim who was stabbed 81 times and subsequently died of exsanguination. Consequently, defendant's sentence of death is firmly grounded on the finding of this aggravating circumstance.

Proportionality Review

Although the Federal Constitution does not require proportionality review, *Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984)* comparative proportionality review remains a relevant consideration in determining the issue of

excessiveness in Louisiana. *State v. Burrell, 561 So. 2d 692, 710 (La. 1990)*; *State v. Wille, 559 So. 2d 1321, 1341 (La. 1990)*; *State v. Thompson, 516 So. 2d 349, 357 (La. 1987).* [**105] This Court, however, has set aside only one death penalty as disproportionately excessive under the post-1976 statutes, finding in that one case, inter alia, a sufficiently "large number of persuasive mitigating factors." *State v. Sonnier, 380 So. 2d 1, 9 (La. 1979)*; see also *State v. Weiland, 505 So. 2d 702, 707-10 (La. 1987)* (in case reversed on other grounds, dictum suggesting that death penalty was disproportionate).

This Court reviews death sentences to determine whether the sentence is disproportionate to the penalty imposed in other cases, considering both the offense and the offender. If the jury's recommendation of death is inconsistent with sentences imposed in similar cases in the same jurisdiction, an inference of arbitrariness arises. *State v. Sonnier, 380 So. 2d at 9.*

The State's Sentence Review Memorandum reveals that since 1976, jurors in the 19th Judicial District Court, which comprises East Baton Rouge Parish, have recommended imposition of the death penalty on approximately 24 occasions, including the present case. Several of the salient features of the case sub judice make it similar enough to other death sentences recommended by juries in the 19th JDC that defendant's [**106] sentence is not disproportionate. See, e.g., *State v. Bowie, 00-3344 (La. 4/3/02), 813 So. 2d 377* (defendant robbed victim over the age of 70 and strangled him with his shoelaces and an electrical cord); *State v. Cosey, 97-*

2020 (La. 11/28/00), 779 So. 2d 675 (defendant raped and slashed throat of 12-year-old victim, stomping her face as he left); *State v. Miller, 99-0192 (La. 9/6/00), 776 So. 2d 396* (defendant robbed and raped 67-year-old woman in her home then killed her home, then killed her by repeatedly stabbing her, slashing her throat, and dropping a couch on her face); *State v. Tilley, 99-0569 (La. 7/6/00), 767 So. 2d 6* (defendant killed a 68-year-old man repeatedly stabbing him during the course of an armed robbery in the parking lot of a Burger King); *State v. Robertson, 97-0177 (La. 3/4/98), 712 So. 2d 8* (defendant repeatedly and viciously stabbed two people during a home invasion); *State v. Jones, 474 So. 2d 919 (La. 1985)* (defendant kidnaped 11-year-old victim, beat her, raped her, and choked her to death, eventually dumping her body in a drainage canal).

The cases above provide strong support for an argument the death penalty imposed in this case is not disproportionate. [**107] It is also appropriate for this Court to look beyond the 19th JDC and conduct the proportionality review on a statewide basis. Cf. *State v. Davis, 92-1623 (La. 5/23/94),* [*150] *637 So. 2d 1012, 1030-31.* Cases are legion in which this Court has affirmed capital sentences based primarily on the jury's finding the defendant killed the victim in the course of an aggravated rape. See, *State v. Harris, 01-2730 (La. 1/19/05), 892 So. 2d 1238*; *State v. Clark, 02-1463 (La. 6/27/03), 851 So. 2d 1055*; *State v. Wright, 01-0322 (La. 12/4/02), 834 So. 2d 974*; *State v. Casey, 99-0023 (La. 1/26/00), 775 So. 2d 1022*; *State v. Connolly, 96-*

1680 (La. 7/1/97), 700 So. 2d 810; *State v. Comeaux, 93-2729 (La. 7/1/97), 699 So. 2d 16*; *State v. Martin, 93-0285 (La. 10/17/94), 645 So. 2d 190*; *State v. Wille, 595 So. 2d 1149 (La. 1992)*; *State v. Lee, 559 So. 2d 1310 (La. 1990)*; *State v. Copeland, 530 So. 2d 526 (La. 1988)*; *State v Eaton, 524 So. 2d 1194 (La. 1988)*; *State v. Carmouche, 508 So. 2d 792 (La. 1987)*; *State v. Williams, 490 So. 2d 255 (La. 1986)*; *State v. Loyd, 489 So. 2d 898 (La. 1986)*; *State v. Jones, 474 So. 2d 919 (La. 1985)*; *State v. Brogdon, 457 So. 2d 616 (La. 1984)*, cert. denied, *471 U.S. 1111, 105 S. Ct. 2345, 85 L. Ed. 2d 862*, [**108] rehearing denied, *473 U.S. 921, 105 S. Ct. 3547, 87 L. Ed. 2d 670 (1985)*.

Because this Court has overwhelmingly upheld death sentences in such cases, and due to the heinousness of the brutal killing as described above, we find the death sentence imposed in this case is not disproportionate.

DECREE

For the reasons assigned herein, the defendant's conviction and death sentence are affirmed. This judgment becomes final on direct review when either: (1) the defendant fails to petition timely the United States Supreme Court for certiorari; or (2) that Court denies his petition for certiorari; and either (a) the defendant, having filed for and been denied certiorari, fails to petition the United States Supreme Court timely, under its prevailing rules, for rehearing of denial of certiorari; or (b) that Court denies his petition for rehearing, the trial court shall, upon receiving notice from this Court under

LA. CODE CRIM. PROC. ANN. art. 923 of finality of direct appeal, and before signing the warrant of execution, as provided by *LA. REV. STAT. ANN. § 15:567(B)*, immediately notify the Louisiana Indigent Defense Assistance Board and provide the Board with reasonable time in which: (1) to enroll [**109] counsel to represent the defendant in any State post-conviction proceedings, if appropriate, pursuant to its authority under *LA. REV. STAT. ANN. § 15:149.1*; and (2) to litigate expeditiously the claims raised in that application, if filed in the state courts.

AFFIRMED.

CONCUR BY: JOHNSON

CONCUR

JOHNSON, J., concurs and assigns reasons:

This case affords us the opportunity to give clear direction to the trial courts as to when they should rule on a motion to change venue.

Defendant filed his motion to change venue on July 17, 2003, then supplemented his motion on January 30, February 6 and February 27, 2004. As is the practice with many trial judges, the court deferred ruling on the motion until after the trial commenced with jury selection on September 13, 2004

LSA-C. Cr. P. art. 622 provides, in pertinent, part:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

[*151] A defendant must prove more than mere public general knowledge or familiarity with the facts of the case, to be entitled to have [**110] his trial moved to another parish. *State v. Frank, 99-0553, p. 16 (La. 1/17/01), 803 So.2d 1, 16* (there is no "bright line" test for determining the degree of prejudice existing in the collective mind of the community...the defendant must show the extent of prejudice in the minds of the community as a result of knowledge or exposure to the case before trial"); *State v. George, 37,492, (La. App. 2d Cir. 9/24/03), 855 So.2d 861, 870* (defendant is not entitled to a jury entirely ignorant of the case and cannot prevail on a motion for change of venue merely by showing a general level of public awareness about the crime).

The jurisprudence shows that the usual practice among trial judges is to wait for voir dire examination of prospective jurors to determine whether jurors can lay aside their impressions or opinions, and render a verdict based on the evidence presented in the case. There has heretofore been no "bright line" rule to give trial courts guidance as to

when the motion for change of venue, must be decided. The result is that the defendant who is required to wait for voir dire examination before winning a change of venue, is prejudiced, when compared to the defendant who won the [**111] change of venue, pre-trial.

Recently, in *State v. Montz, 07-K-0653, (La. 11/21/07) 968 So. 2d 727*, this Court suggested that the better practice is to rule on the defendants' motion to change venue, *pre-trial.* In *Montz,* the trial court granted the pre-trial motion after the defendants introduced into evidence over 140 articles published or broadcast between January and August 2005, concerning the death of Levon Jones, at Club Razzo in New Orleans, Louisiana.[1] At the hearing on the motion to change venue, the defendants presented the testimony of their pollster, Joe Walker, who testified that based on two polls he Conducted in the Summer of 2005(pre-Hurricane Katrina) and one taken in February 2006, the results revealed that 98% of those polled were familiar with the facts of the case.

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[1] On December 31, 2004, Levon Jones, an African-American college student athlete from Georgia was celebrating New Years Eve on Bourbon Street with a group of friends and family members. The group was denied admission to Razzoo's Bar, purportedly because of a dress code violation by one of the group members. During an ensuing scuffle, Jones was fatally injured by the bar's security personnel (a/k/a "bouncers") [**112] stationed at the barroom entrance. Several bystanders videotaped the incident and those videotapes subsequently were shown in the television of the student's death.

Here, in support of the motion for change of venue, defendant filed into evidence over 5,000 pages of printed media reports and newscast transcripts published between July 2002 and January 2004 that related to the South Louisiana Serial Killer. The trial court deferred the defendant's motion for change of venue until after jury selection. The majority concludes that this media coverage was not prejudicial since the coverage was factual and not inflammatory. The jury pool consisted of 1,300 persons and over 98% of prospective jurors polled had heard something about the case, from either media outlets or acquaintances. Nevertheless, the trial court denied the motion to change venue

Our jurisprudence is replete with instances where despite high exposure to publicity before the trial, the trial judge denied the motion for change of venue, and this Court held that such denial did not result in reversible error. In *State v. Frank, supra*, voir dire demonstrated that 110 out of 113 venire members (97%) had [*152] been exposed to some publicity [**113] surrounding the case, and 89% of the prospective jurors indicated they had been exposed to information about the case on more than one occasion or from multiple sources. *See also Hoffman, 98-3118 at p. 9, 768 So.2d 542, cert. denied, 531 U.S. 946, 121 S. Ct. 345, 148 L. Ed. 2d 277 (2000)*;[72 out of 90 prospective jurors (80%) had awareness of the case before trial]; *State v. Connolly, supra,* [although 120 out of 139 potential jurors (86.33%) possessed some knowledge about the crime, most had only a vague recollection of the surrounding facts].

Conclusion

When we consider the fact that 97% and 98% of the prospective jurors in *Frank, Montz,* and in this case, were exposed to pre-trial publicity and were familiar with the facts of the case, yet the trial judges reached disparate results on the question whether the jurors could put aside preconceived notions as to the guilt or innocense of the defendant, and make an unbiased judgment, my preference would be appellate review, pre-trial, of whether the trial court abused its discretion, rather than a review of this issue at the end of a very expensive trial on the merits.

SUPREME COURT OF LOUISIANA
No.2005-KA-2098

STATE OF LOUISIANA
vs.
DERRICK TODD LEE

ON APPEAL FROM THE 19TH JUDICIAL DISTRICT COURT, FOR THE PARISH OF EAST BATON ROUGE, HONORABLE RICHARD D. ANDERSON, JUDGE

UNPUBLISHED APPENDIX

KNOLL, JUSTICE

Short Form Indictment

In this assignment of error, defendant, relying upon *Ring v. Arizona*, 536 U. S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), contends the short form indictment filed in this case is insufficient. Specifically, defendant complains the bill of indictment failed to allege any aggravating factors necessary to support a death sentence.

Defendant refers to the observation in *Ring* that "'[u]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.'" *Ring*, 526 U.S. at 245, 122 S.Ct. at 1225 (quoting

Jones v. United States, 526 U.S. 227, 243, n.6, 119 S.Ct. 1215, 1224, n.6, 143 L.Ed.2d 311); *see also Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 2362-63, 147 L.Ed.2d 435 (2000).

As an initial matter we note defendant failed to raise this claim in a motion to quash, and thus waived it. LA. CODE CRIM. PROC. ANN. art. 841; LA. CODE CRIM. PROC. ANN. art. 521 (all pretrial motions must be filed within 15 days of arraignment); *see also State v. Lindsey,* 94-1559 (La. 3/17/95),651 So. 2d 264 (Court denies writs when even capital convict failed to raise before trial indictment issue); *State v. Lee,* 340 So. 2d 180, 182 (La. 1976) (motion to quash is the appropriate vehicle for challenging the validity of a grand jury indictment).

Regardless of defendant's failure to file a motion to quash, LA. CODE CRIM. PROC. ANN. art. 465 authorizes the use of specific short form indictments in charging certain offenses, including first degree murder. The constitutionality of the short forms has been consistently upheld by this Court. *State v. Draughn*, 05-1825 (La. 1/17/07), 950 So.2d 583, 624; *State v. Baylis*, 388 So. 2d 713, 718-19 (La. 1980); State v. Liner, 373 So. 2d 121, 122 (La. 1979); *see also Schad v. Arizona*, 501 U.S. 624, 631-37, 111 S.Ct. 2491, 2496-2500, 115 L.Ed.2d 555 (1991) (indictments are not required to specify which overt act was the means by which a crime was committed); *but see State v. Liner,* 373 So.2d at 123, (Calogero, J., dissenting). When those forms are used, it is intended a defendant may procure details

as to the statutory method by which he committed the offense through a bill of particulars. *State v. Baylis,* 388 So.2d at 719; *State v. Johnson,* 365 So. 2d 1267, 1270-71 (La. 1978); LA. CODE CRIM. PROC. ANN. art. 465 Official Revision Comment (a).

In the present case, the State properly charged defendant under the short form indictment, which read, in pertinent part, that: Derrick Todd Lee on May 31, 2002, at and in the Parish, District and State aforesaid, committed the offense of First Degree Murder as defined by Louisiana Revised Statutes Title 14: Article 30 in that the defendant committed First Degree Murder of Charlotte Murray Pace. Trial Tr. vol. I, 98. Accordingly, the State charged defendant in compliance with LA. CODE CRIM. PROC. ANN. art. 465(A)(31), which provides a short form indictment for first degree murder: "A.B. committed first degree murder of C.D." *See State v. Neslo,* 433 So. 2d 73, 81-82 (La. 1983).[2]

Here the State notified the defense of the aggravating circumstance upon which it would rely in a pretrial pleading filed on August 13, 2003. Specifically, the State cited the statutory aggravating factors under LA. CODE CRIM. PROC. ANN. art. 905 4(A)(1) and (7), alleging the defendant engaged in the perpetration or attempted perpetration of one of the listed offenses (except for

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[2] Notably, the offenses referred to in the indictment under LA. REV. STAT. ANN. § 14:30(A)(1) and (2)(a) mirror the aggravating circumstances upon which the State relied, LA. CODE CRIM. PROC. ANN. art. 905.4(A)(1) and (7).

drive-by shooting,) and that he did so in an especially heinous, atrocious, or cruel manner.

The long-standing Louisiana practice of requiring an indictment, which must be supplemented by the State if the defendant requests so, satisfies the passing mention of "indictments" in the above excerpts from *Ring* and *Jones*. *See State v. Washington*, 03-2890 (La. 1/30/04), 865 So. 2d 60 (reinstating short form indictment for first-degree murder set aside by court of appeal under *Ring*); *cf. State v. Gainey*, 376 So. 2d 1240, 1242 (La. 1979)("It is now clear that the constitutional provision that a defendant be informed of the nature and cause of the accusation is not to be restricted to mean that he must be informed *by indictment* .... [A] short form indictment is not subject to attack on the grounds that it does not adequately inform the defendant of the crime charged, because the state is required, on request for a bill of particulars, to inform the defendant of the essential elements of the charged offense.")(italics in original)(citations omitted). Finally, defendant does not suggest he was improperly informed of the charges against him, nor does he present any specific allegations of prejudice arising from the claimed-defective indictment. This claim is without merit.

Allotment procedure of the 19th Judicial District Court

Defendant next claims the case allotment procedure of the 19th Judicial District Court violates due process. Specifically, defendant contends the allotment process of the 19th JDC permits the

district attorney to select the courtroom in which it prefers to proceed. *See State v. Simpson,* 551 So. 2d 1303, 1304 (La. 1989) (due process requires allotment procedure which does not allow the state to handpick which case goes to which judge).

In the present case, defense counsel filed a motion to re-allot or transfer the case to Judge Johnson in Section I of the district court. In this manner, he challenged the allotment of the case to Judge Anderson in Section II of the 19th JDC. Defendant's motion involved the particular method of assigning duty judges in East Baton Rouge Parish and was premised on whether Charlotte Murray Pace died before or after a scheduled transfer of duty from Section I to Section II. Judge Anderson denied the motion. On supervisory writs the Court of Appeal, First Circuit, denied defendant's application to overturn that ruling. *State v. Lee,* 03-1705 (La. App. 1 Cir. 8/13/03). We also denied defendant's application for supervisory writs on this issue. *State v. Lee,* 03-2261 (La. 8/13/314), 851 So. 2d 314. Although generally a pre-trial denial of writ review does not preclude reconsideration of an issue on direct appeal, *State v. Fontenot,* 550 So.2d 149 (La. 1989), defendant now must demonstrate in this post-verdict context that the allotment procedure actually prejudiced his case. *State v. Prudhomme,* 99-2029 (La. App. 3 Cir. 6/5/02), 819 So. 2d 443, 450, *writ denied,* 06-2073 (La. 6/27/03), 847 So. 2d 1251.

After reviewing this issue, we find the defendant does not overcome the State's argument that the allotment was in conformity with the

common practice of the 19th JDC. Instead, the defendant intimates the trial court and State conspired to manipulate the system for allotting cases to ensure Judge Anderson heard the case. As a result, the defendant makes no showing the allotment procedure prejudiced him in any way. LA. CODE CRIM. PROC. ANN. art. 921 (precluding reversal on appeal of any judgment or ruling which "does not affect the substantial rights of the accused"); *State v. Claxton,* 603 So. 2d 247, 249 (La. App. 1 Cir. 1992) (assignment of trial under unconstitutional allotment system was at most harmless error given defendant's failure to allege actual prejudice); *State v. Jones,* 600 So. 2d 875, 879 (La. App. 1 Cir. 1992), *writ denied,* 92-2351 (La. 5/12/95), 654 So. 2d 346 (error in using criminal case allotment system that violated defendant's rights and due process was harmless). Accordingly, this assignment of error lacks merit.

Due Process: Choosing Jury Venire

In this assignment of error, defendant alleges methods chosen to assemble the jury venire denied him due process. To support this claim, defendant postulates his right to be present when jurors are called and/or excused was improperly denied. Because the venire was generated solely for his trial, he first alleges the dismissal of a significant number of jurors without his presence violated his due process rights. Defendant then additionally claims there was error when the jury coordinator determined to release venire men based on predetermined excuses such as school attendance,

age, out-of-parish residence, or medical necessity. Finally, defendant contends the number of jurors that did not appear when summoned raised an unacceptable risk that defendant's venire did not represent a fair cross section of the community. Defendant presented these contentions in a motion to quash the jury venire which the trial court denied.

A general venire, grand jury venire, or petit jury venire shall not be set aside for any reason unless fraud has been practiced, some great wrong committed that would work irreparable injury to the defendant, or unless persons were systematically excluded from the venires solely upon the basis of race. LA. CODE CRIM. PROC. ANN. art. 419(A). In the present case, defendant does not allege fraud or racial discrimination. Thus, to obtain relief in the present case he must show the method chosen to assemble the jury venire irreparably injured him.

As provided in LA. CODE CRIM. PROC. ANN. art. 831(A)(3) a criminal defendant charged with a felony has a right to be present "[a]t the calling, examination, challenging, impaneling, and swearing of the jury, and at any subsequent proceedings for the discharge of the juror or of a juror..." *See also State v. Hampton*, 98-2605 (La. 5/28/99), 737 So. 2d 699, 700; *State v. Spencer*, 446 So. 2d 1197, 1199-1200 (La. 1984); *State v. Copeland*, 419 So. 2d 899, 905 (La. 1982); *State v. White*, 244 La. 585, 153 So. 2d 401 (1963). However, that right is not absolute. *State v. Hampton,* 737 So. 2d at 700. A juror is not called or examined within the meaning of LA. CODE CRIM. PROC. ANN. art. 831 (A)(3)

until he is called for examination in the trial of that particular defendant. *State v. Meriwether*, 412 So.2d 558, 559 (La. 1982). A trial court may excuse members of the venire in advance of the time of trial, providing it does not abuse its discretion in this regard. *State v. Williams*, 248 So. 2d 295, 296 (La. 1971); *cf. State v. McGuire*, 225 So. 2d 215, 218 (La. 1969) (holding it proper to dismiss a juror out of the presence of defendant when done for case-neutral reasons based on general qualifications of juror that were unrelated to any specific case).

Even though it was unusual for a jury venire of this size to be drawn for a single case,[3] the dismissals of potential jurors were done in the same manner as would be done for a general venire. While technically the jurors were "called" for the specific case, the dismissals occurred before any jurors reached the courtroom, just as they would have been had defendant's trial assembled its venire in the traditional fashion. This claim is without merit, especially where defendant shows no prejudice or abuse of discretion. *State v. Sheppard*, 350 So.2d 615, 650 (La. 1977) (the discretion to release prospective jurors in advance of voir dire examination is not to be disturbed unless there is a showing of fraud or collusion resulting in prejudice to the accused); *Williams, supra.*

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[3] Mona Collins, the jury coordinator for the 19th Judicial District Court stated 1,300 summonses were issued for defendant's trial.

We further point out the trial court is authorized to excuse a person from jury service either before or after selection to the general venire or jury pool if such service would result in undue hardship or extreme inconvenience. The trial court is permitted to take this action on its own initiative or on the recommendation of an official or employee designated by the court. *See* LA. CODE CRIM. PROC. ANN. art. 783(B); *State v. Brown,* 414 So. 2d 726, 728 (La. 1982). The trial court is vested with broad discretion in excusing prospective jurors for undue hardship. *State v. Ivy*, 307 So. 2d 587, 590 (La. 1975). Defendant has not shown an abuse of discretion and this claim fails.

Moreover, we observe defendant's contention there was an unacceptable risk of a lack of fair representation of the community is not supported with any specificity. Mona Collins, the jury coordinator, stated the names for the venire were obtained from the DMV and voter registration rolls. Collins stated there was no information about the race or gender of those selected, and because the notices were mailed, not hand delivered, there was no information, other than basic zip code information, by which she could discriminate. Accordingly, we find defendant's claim that the jury venire did not represent a fair cross-section of the community is unsubstantiated.

Voir Dire

Defendant posits a two-pronged complaint about voir dire examination: first, he contends the

trial court erred when it granted five State challenges for cause; secondly, he further contends the trial court erred when it denied 15 defense challenges for cause. Defendant's contentions about the State's cause challenges involve the prospective jurors's ability to impose the death penalty. As to defendant's delineation of the 15 cause challenges he raised, most are based in whole or in part on the jurors's knowledge of defendant's second-degree murder conviction in West Baton Rouge Parish a month before voir dire began in the present prosecution, *see* n. 8, *supra in the published opinion*, and further concern the jurors's predisposition to find defendant was guilty of the present charged offense. The other common basis for defendant's cause challenges concern the prospective jurors's inability to consider mitigating factors in deciding whether the imposition of the death penalty was called for in the present case.

The grounds for which a juror may be challenged for cause are set forth in LA. CODE CRIM. PROC. ANN. art. 797. Two of these grounds are pertinent here, namely, that "[t]he juror is not impartial, whatever the cause of his partiality," and "[t]he juror will not accept the law as given to him by the court." LA. CODE CRIM. PROC. ANN. art. 797(2) and (4).

The proper standard for determining when a prospective juror may be excluded for cause because of his views on capital punishment is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in

accordance with his instructions and his oath." *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d. 776 (1968) (holding that a prospective juror who would vote automatically for a life sentence is properly excluded); *see also Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985); *State v. Sullivan*, 596 So.2d 177 (La. 1992), *rev'd on other grounds sub nom Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). In a "reverse-Witherspoon" context, the basis of the exclusion is that a prospective juror "will not consider a life sentence and ... will automatically vote for the death penalty under the factual circumstances of the case before him ...." *State v. Robertson,* 92-2660 (La. 1/14/94), 630 So.2d 1278, 1284.[4] Jurors who cannot consider both a life sentence and a death sentence are "not impartial," and cannot "accept the law as given ... by the court." LA. CODE CRIM. PROC. ANN. art. 797(2),(4); *State v. Maxie,* 93-2158 (La. 4/10/95), 653 So. 2d 526, 534-35. In other words, if a prospective juror's views on the death penalty are such that they would "prevent or substantially impair the

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[4] The "substantial impairment" standard applies to reverse-*Witherspoon* challenges. In *Morgan v. Illinois,* 504 U.S. 719, 738-39, 112 S.Ct. 2222, 2234-35, 119 L.Ed.2d 492 (1992), the Supreme Court held venire members who would automatically vote for the death penalty must be excluded for cause. The Court reasoned that any prospective juror automatically voting for death would fail to consider the evidence of aggravating and mitigating circumstances, thus violating the impartiality requirement of the Due Process Clause. *Id.*, 504 U.S. at 728-29, 112 S.Ct. at 2229. The *Morgan* Court adopted the *Witt* standard for determining if a pro-death juror should be excused for cause.

performance of their duties in accordance with their instructions or their oaths," whether those views are for or against the death penalty, he or she should be excused for cause. *State v. Blank,* 955 So. 2d at 113; *State v. Taylor,* 99-1311 (La. 1/17/01), 781 So.2d 1205, 1214.

A trial court is vested with broad discretion in ruling on challenges for cause and its rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. *State v. Cross,* 93-1189 (La. 6/30/95), 658 So.2d 683, 686-87. A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the juror's responses as a whole reveal facts from which bias, prejudice or inability to render judgment according to law may be reasonably implied. *State v. Hallal,* 557 So. 2d 1388, 1389-90 (La. 1990). However, a trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion not withstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and evidence. *State v. Robertson,* 630 So. 2d at 1281; *State v. Cross,* 658 So. 2d at 686-87.

Prejudice is presumed by a trial judge when a challenge for cause is denied erroneously by a trial-court and the defendant ultimately exhausts his peremptory challenges. *State v. Robertson,* 630 So.2d at 1280; *State v. Ross,* 623 So. 2d 643, 644 (La. 1993). However, in Louisiana, a defendant must use

one of his peremptory challenges curatively to remove the juror, thus reducing his remaining peremptory challenges, or waive any complaint on appeal. *State v. Blank*, 955 So. 2d at 113; *State v. Connolly*, 96-1680 (La. 7/1/97), 700 So. 2d 810, 818; *State v. Bourque*, 622 So. 2d 198, 229-30 (La. 1993); *State v. Fallon*, 290 So. 2d 273, 282 (La. 1974).[5] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. *State v. Cross*, 658 So. 2d at 686; *State v. Bourque*, 622 So. 2d at 225.

State Cause Challenges:

Paula Goines: Goines, an elementary schoolteacher, stated she had heard little about the serial killer cases, and said she could set aside any previous information she heard regarding the case. She assured the trial court she could decide defendant's guilt based on the evidence presented at trial. Goines also knew relatively little about defendant's West Baton Rouge Parish conviction.

However, her suitability as a juror arose in connection with her responses to her willingness to

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[5] The rule is different at the federal level. *See United States v. Martinez-Salazar*, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from district court's erroneous denial of a cause challenge). At the federal level, a defendant may choose whether to exercise a peremptory challenge to cure the trial court's error, or to seat the juror and then raise the error on appeal if convicted. *Martinez-Salazar*, 528 U.S. at 315, 120 S.Ct. at 781.

impose the death penalty. Through her answers, it became apparent Goines believed the death penalty was automatic upon the finding of guilt. When the State informed her otherwise and told her of her personal involvement with the decision-making process, she began to waiver in her ability to return a death verdict. To some degree, defense counsel rehabilitated the juror, but her answers show she clung to her perception the death penalty is automatic, repeatedly stating it was an appropriate sentence, if the punishment fit the crime.

The trial court was attentive to Goines's vacillations and when asked by the court to clarify her responses, she agreed the prospect of being responsible for a death verdict would substantially impair her ability to return one. The trial court also noted during argument on the State's challenge for cause that Goines's physical demeanor dramatically changed when informed that the decision for death was neither made by the judge nor by process of law. The record shows Goines expressly stated that her views would substantially impair her ability to return a death verdict. *See Witt,* 469 U.S. at 424, 105 S.Ct. at 852. Considering the foregoing, we find the trial court did not abuse its discretion when it granted the State's cause challenge, realizing that this juror was, at best, unsure of her attitude toward the death penalty.

Lille Anderson: Anderson had heard some of the trial details in the local media about the defendant's prosecution in West Baton Rouge Parish. She felt she could generally consider the death

penalty, and further stated race would not play a factor in her decision. She forthrightly stated she could consider all mitigating factors presented to her, and she could listen to the opinions of others during deliberations.

However, during Anderson's questioning, she began to indicate she may not be able to hold to her own convictions if she were a lone holdout. Moreover, initially she clearly expressed her desire, then her conclusory belief, that if the defendant were able to show mental illness, disease, or defect, she could not return a verdict in favor of the death penalty. Although Anderson could do so for a temporary insanity, she would automatically rule out a death sentence in her mind if any form of diminished capacity were proven. With this inability to return a verdict of death under certain circumstances involving the mental capacity of defendant, a position defendant would claim in the penalty phase, we find no abuse of discretion when the trial court granted the State's cause challenge.

Gloria Brandon: Brandon stated she had heard of the serial murder case, but agreed she could put aside any prior opinions and decide the case on the evidence presented. She expressed her preference to not decide a case where the death penalty . was involved. Later, however, she stated she had "no reservations" with the death penalty, and said she could consider both life and death sentences. Although she initially stated she did not know if certain mitigating factors would prevent her from returning a death sentence, she later admitted

the control by others and mental defect factors would prevent her from recommending the death sentence.

During the State's questioning, Brandon stated she could not sentence someone to death if that person was convicted on the basis of circumstantial evidence. Despite changing her answer after a complex defense hypothetical question and confusingly explaining herself, Brandon stated she would have extreme difficulty with returning a death sentence if the case was based on circumstantial evidence. Based upon her refusal to consider the death penalty when mental defects are presented and where the majority of evidence is circumstantial, we find the trial court did not abuse its discretion when it granted the State's cause challenge.

Karen Cameron: As to defendant's guilt, Cameron stated she had heard of the case, and opined defendant was probably guilty. However, she also stated she could set aside her previously held opinion. She was generally aware of another murder conviction, and felt somewhat relieved when defendant was arrested. When asked how she was affected by the attention given to the hunt for the serial killer, Cameron stated she took minor precautions during the height of the manhunt.

As to the penalty phase, Cameron's answers conflicted with both the State and defense questions. On the one hand, she agreed with the death penalty when the crime was malicious, willful, and multiple,

imagined she would be very in favor of the death penalty if the victim were a family member, and could vote for the death penalty if it was appropriate. However, Cameron also stated she had never really considered the death penalty and she had serious reservations about it. When asked to quantify her level of hesitation on a one-to-ten scale, she said her hesitancy was a "10." Along that line, she stated she would find it extremely difficult to return a death verdict.

Viewing this prospective juror's examination as a whole, it is evident Cameron's answers went beyond the seriousness of a death penalty case, and instead suggested she would place an extremely high burden on the State to justify the death penalty. Even though Cameron could easily consider all mitigating factors, she would find it extremely difficult to return a death verdict. Cameron's hesitancy to return a verdict of death in a home invasion, rape, and murder suggests a higher level of proof than beyond a reasonable doubt needed to warrant a death penalty verdict. To a large degree, the defense rehabilitated the juror, but her overall answers and demeanor as noted by the trial court suggested her high level of discomfort with the idea of sentencing someone to death. Thus, we find the trial court did not abuse its discretion when it granted the State's cause challenge.

Lorraine Ike: During her initial questioning by the State, Ike clearly believed a murder conviction should automatically result in a death sentence. She expounded upon her belief and specifically stated

that life is never an appropriate sentence for a murder.

Despite Ike's beliefs, after the defense's questioning and presentation of mitigating factors, she appeared to reevaluate her position. During the explanation of the individual mitigating factors, Ike agreed she could consider a life sentence for all of them. Ultimately, she continuously said she could consider both a life or death sentence.

Later during her examination, Ike appeared unsure whether she could convict on circumstantial evidence. Although she concluded shortly thereafter that she could convict with such evidence, Ike later stated, after a long hesitation, she would sentence defendant to life imprisonment. During the State's re-examination, Ike became confused about which verdict she would return, and then asked to stop the questioning. Both the State and the trial court noted Ike's negative physical response to questions posed to her when she was asked if she could impose the death penalty. The trial court even observed that the defense had so thoroughly rehabilitated the juror, she espoused beliefs diametrically opposed to her previously expressed opinions. Because of the extreme incongruity of the potential juror's responses over the course of voir dire and her vacillation, we find the trial court did not abuse its discretion when it granted the State's challenge for cause. *See State v. Frost,* 97-1771 (La. 12/1/98), 727 So. 2d 417, 425 (a trial judge is not expected to rely upon one isolated area of voir dire, consequently a trial court is not bound by a juror's answer to a

particular question when that answer is inconsistent with other answers and other facts and circumstances known to the judge as a result of the entire examination)(*citing State v. O'Conner,* 320 So.2d 188, 191 (La. 1975); *see also, State v. Oliphant,* 56 So. 2d 846,847 (La. 1952)).

Defense cause challenges:

Wanda Paul: Paul stated she was unaware of the specifics of the circumstances of the Pace murder. She further said that she modified her lifestyle during the height of the serial killer media coverage so that she was aware of her surroundings, but she did little else. She knew of the defendant's West Baton Rouge Parish conviction, but said it would not affect her judgment in the present case, and further stated she could set aside any other extraneous information she had heard or seen about the case. Although she insisted she had the right to reject any mitigating factors, those presented or not, she conceded she would consider them during the penalty phase. Paul espoused the proposition that a conviction would not automatically result in a death sentence. Her attitude regarding diminished capacity was that she would give little value to such a claim if it was shown the defendant appeared to be able to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. However, in her opinion, an incapacitating mental defect was a strong mitigating factor. Additionally, Paul insisted even if she were the lone holdout for life imprisonment, she would likely maintain her convictions unless her fellow jurors thoroughly

persuaded her otherwise. Paul stated that after aggravating factors were presented during the penalty phase, she would consider any mitigating factors, and she would base her decision on the balancing of the two. She clearly and repeatedly demonstrated her ability to follow the law as presented and her desire to disregard outside influence and information. *See e.g., United States v. McVeigh,* 153 F.3^{d} 1166, 1179-84 (10th Cir. 1998) (no actual prejudice in bombing trial despite intense national media coverage because court gave strong admonition to ignore pretrial publicity, each juror was questioned individually about effect of exposure, and each juror declared impartiality), Considering the full panoply of Paul's responses, we find the trial court did not abuse its discretion when it denied defendant's cause challenge.

Mark Holmes: Holmes presented himself as intelligent, articulate, and exhibited a recognition that DNA evidence is only as good as the collection procedures involved. As Holmes expressed, even Osama Bin Laden is entitled to a defense and the presentation of mitigating factors, which he would consider in any case. Even after being repeatedly asked to hypothesize about a situation where an automatic death penalty would be appropriate, Holmes declined to do so.

Against that backdrop defendant based his cause challenge on Holmes's knowledge of defendant's conviction in West Baton Rouge Parish for second-degree murder. Despite conceding familiarity with a few specifics of the Pace murder

and West Baton Rouge Parish conviction, Holmes assured the court he would set aside all previous knowledge in favor of evidence presented at trial and that he would abide by the trial court's instructions. *See e.g., Snell v. Lockhart,* 14 F.3d 1289, 1263 (8th Cir. 1994) (no actual prejudice despite media coverage of defendant's conviction in another case because coverage solely factual and not inflammatory); *United States v. Beniach,* 825 F.2d 1207, 1212-13 (7th Cir. 1987) (no actual prejudice despite juror's knowledge through publicity of guilty pleas entered by other defendants because judge questioned juror and juror claimed ability to remain impartial).

Contrary to defendant's allegations before us, our review of Holmes's examination shows he never specifically stated he "believed in more public and speedy executions." Defendant's br. at 20. Instead, Holmes expressed his concern with the pace of the appellate process and the dilution such delay had on the deterrent value of capital punishment. He opined the death penalty may have more deterrent value if conducted in public, as it once was. Viewing the totality of Holmes's voir dire examination, we find the trial court did not abuse its discretion when it denied defendant's cause challenge.

Steven Kiffe: Kiffe, a financial analyst, presented as a well-qualified potential juror. Although Kiffe said that based on what little he had already heard about the cases he thought the defendant was guilty, he also assured the trial court he could put aside any preconceived conclusions and

only consider the evidence put before him. Time and again throughout the course of his examination, Kiffe expressed his ability to rationally examine only the evidence that was presented during the trial.

Several times Kiffe explained he was disinterested in local news stories that did not affect him personally, and that due to an eye injury, he was unable to read or watch much of anything in the months preceding the defendant's trial. In fact, it appeared Kiffe was unaware of which victim was at issue in the present prosecution. Although Kiffe stated the West Baton Rouge Parish conviction solidified his abstract belief in defendant's guilt in the present case, he conceded he gave the issue so little thought or attention that he could not describe the conclusion as a considered one. When confronted with a hypothetical scenario about the murder of an immediate family member, Kiffe stated he would not automatically apply the death penalty. *See State v. Blank,* 955 So.2d at 121-120 (juror's attitude concerning their attitude should family members be murdered constituted an extreme hypothetical situation that does not serve as a fair litmus test of the juror's qualification to serve). Moreover, he felt he would honestly obey the instructions of the trial court and consider any and all mitigating factors presented to him because of the seriousness that a capital case involves. Finally, Kiffe stated he would not let any concern of a community backlash against an unpopular verdict affect his deliberations.

The defense challenged Kiffe for cause, citing his knowledge of the West Baton Rouge Parish

conviction. During the explanation of that reasoning, the defense declared that Kiffe was perhaps too good to be true, and insinuated he was campaigning for service on the jury. Examination of Kiffe's voir dire questioning reveals the trial court did not err in rejecting both theories the defense proposed. Thus, we find the trial court did not abuse its discretion when it denied defendant's cause challenge.

Nancy Plaisance: Plaisance, the sister of a public defender's office investigator, stated she had heard of the case, and had formed an opinion as to defendant's guilt upon his arrest. She nonetheless clarified that she could put aside that prior opinion and her knowledge of defendant's West Baton Rouge Parish conviction, and fully examine all the evidence presented to her at both phases of the trial. She claimed the local media sensationalized the story. She also assured the court she would keep an open mind to all mitigating circumstances, and would seriously consider them. She advised the court she had a very limited understanding of DNA evidence, and she expressed a need to see more evidence to form a fully considered opinion. Although Plaisance said she had purchased mace and was more alert during the search for the serial killer, she admitted her fear subsided even before defendant was arrested. She also said she did not replace the mace after it had been confiscated at an airport.

Defendant's cause challenge was based both on Plaisance's statement she felt some relief after defendant had been arrested, and that she was aware of the West Baton Rouge Parish conviction.

During her voir dire examination, Plaisance only described a vague fear of the serial killer and she took minimal steps to guard against an attack. Morever, when the trial court recalled her into the courtroom for further examination, Plaisance reiterated her willingness to set aside the defendant's prior conviction in her determination of defendant's guilt in the present case. After considering defendant's contentions and re-examining the record of voir dire, we find defendant failed to demonstrate the trial court abused its discretion in denying this cause challenge.

Jennifer Pontti: The record shows Pontti was an intelligent and articulate nurse. During most of the time the search for the South Louisiana Serial Killer was conducted, she lived in New Orleans while she attended nursing school. Although Pontti conceded she armed herself with a knife in her bedroom during her time in New Orleans, her answers to voir dire questioning suggests her defensive actions were due to the threat of violence from the everyday menace of murderers and rapists. Pontti noted that during the hunt for the serial killer she was more "aware" and was told to watch out for "white men driving white pickup trucks." Pontti declared she felt safer moving back to Baton Rouge, even before the defendant was arrested. She stated defendant's arrest meant little to her because she felt the police may have apprehended the wrong man.

With regard to mitigating factors, Pontti, perhaps because of her above-average contact with mental health patients in the state's charity hospital system, suggested mental defect as a mitigating factor before either the State or the defense touched upon that subject during her voir dire examination. In any case, Pontti stated she would seriously consider all mitigating factors, especially any mental defects, presented to her. However, Pontti did suggest that due to the heinousness of the Pace murder, the mitigating factors would need to be compelling even as she considered them all. The determination of mitigating factors, in her view, would have to be very fact specific. Nonetheless, even when defense counsel repeatedly pressed her, Pontti stated she could not theorize about a verdict without having heard any evidence presented to her.

The record shows Pontti also understood that while DNA can prove to be a valuable identifier, its reliability was only as good as the collection techniques utilized and the procedures used to analyze it. While Pontti opined "it didn't look good for the home team," she did so with the qualification this was only with "everything you see, everything you hear, knowing what I know right now," and that everything she had heard prior to being called for jury duty was "just gossip." Trial Tr. vol. XXIV, 5844 (Sept. 17, 2004).

Pontti acknowledged she had heard of the West Baton Rouge Parish conviction, even referring to the victim by name. She, however, later assured the court she could set aside her knowledge of

defendant's conviction in that case and judge defendant on the facts of the present prosecution.

Defendant challenged Pontti based on her pre-determination of defendant's guilt and by her support for the death penalty. Our review of the record shows Pontti consistently stated while she may have had an opinion based on partial facts, she was able to set aside those opinions and examine the evidence presented to her. Furthermore, while Pontti was in favor of the death penalty, she acknowledged its seriousness when confronted with the defendant sitting in the courtroom. She accepted the seriousness of the jury's task and her overall answers demonstrated this. Defendant failed to demonstrate the trial court abused its discretion in denying the cause challenge.

Roy Brooks: Brooks stated he understood the bifurcated process of a capital trial and he would consider mitigating factors while deliberating the appropriateness of the death penalty. Although he was aware of defendant's West Baton Rouge Parish conviction, he stated he had formed no opinion about the present offense. While he acknowledged his daughter was generally fearful during the height of the South Louisiana Serial Killer search, he and, his family did not let their guard down after defendant was arrested.

Defense counsel challenged Brooks for cause because of his knowledge of the West Baton Rouge Parish conviction. As shown in the record, the trial court believed Brooks when he said he could look

beyond his knowledge of the past when formulating an opinion in the East Baton Rouge Parish case. Defendant again fails to demonstrate the trial court abused its considerable discretion in denying the cause challenge.

Merrill Hotard: As many of the prospective jurors before and after him, Hotard recounted media reports concerning the South Louisiana Serial Killer, and told the court he knew of defendant's West Baton Rouge Parish conviction. However, he was unable to provide more than a vague recollection of those stories. Hotard frankly responded during voir dire and admitted he had formed an opinion of defendant's guilt before jury selection began. Nonetheless, he repeatedly assured both counsel and the court he could put those opinions aside and focus on the evidence presented. He further stated he would not let the media coverage affect his decision regarding defendant's guilt or innocence. Although he claimed he had been generally concerned with his wife's safety, he took no special precautions to protect her. He conceded he relaxed his guard somewhat after defendant's arrest, and he casually kept up with developments in the case against defendant.

The defense challenged Hotard for cause citing his knowledge of the West Baton Rouge Parish conviction and his preconceived notions about this case. Notwithstanding Hotard's notions, the record shows he was clear about his lack of enthusiasm for serving on the defendant's jury, his willingness to put aside any information he may have previously

heard, and his openness to consider any evidence presented in mitigation. Based upon the overall tenor of Hotard's responses in the course of voir dire examination, we find no abuse of discretion in the trial court's denial of defendant's cause challenge.

Andrea Stick: Stick was a promising prospective juror for both sides. She had left the United States for Saudi Arabia immediately after defendant's arrest, and did not return until 10 months later. She heard nothing about the case during that time, and did not know of defendant's West Baton Rouge Parish conviction. Stick stated she would consider all the mitigating factors presented to her, and would not automatically impose the death penalty.

Stick also told the court she was scared for her daughter during the period before defendant's arrest because her daughter fit the profile of several of the victims. However, other than praying for her daughter's safety, she took no other precautions. While she initially stated she did not have a pre-formed opinion of defendant's guilt, upon further questioning by defense counsel, she admitted that upon defendant's arrest that she had hoped the police had captured the right man and that the murders would stop. However, throughout her voir dire examination, Stick stated she could put aside any prior opinions and judge defendant on the evidence presented at trial. Despite defense counsel's challenge for cause based on Stick's concern for her daughter, the trial court believed her statements that she could objectively view the evidence with no

preconceptions, consider mitigating circumstances, and felt Stick was unusual in her lack of exposure to pre-trial media reports for the preceding ten months. After carefully reviewing the record, we find defendant failed to show the trial court abused its discretion in denying this cause challenge.

Jeffrey Burnett: Burnett was another potential juror with unique circumstances that made him an attractive candidate for both sides. With employment based in the vicinity of the Slidell/New Orleans area, Burnett was not frequently in Baton Rouge. As a result, his disinterest in discussing the case with his family or co-workers, and his dislike for reading the newspaper beyond the sports section, Burnett did not know many specifics of the South Louisiana Serial Killer case. Burnett said he could consider the death penalty, but opined the imposition of the death penalty was never automatically called for and was appropriate only "when the shoe fits."

Burnett stated he would absolutely consider all mitigating factors, but would give some more weight than others. Although Burnett was unable to formulate a hypothetical instance where the death penalty would be inappropriate for first-degree murder, he emphatically and repeatedly stated such circumstances existed, and he assured the court he would fairly consider all mitigating factors during the serious deliberations of the penalty phase.

Defense counsel challenged Burnett for cause for his disbelief in the mitigation factor of dominion

of another person. However, when the State supplied a hypothetical case based upon dominion, Burnett understood there could exist situations such as the "Stockholm Syndrome" where he would find the death penalty inappropriate. Viewing this prospective juror's voir dire examination as a whole, contrary to defendant's allegation in brief, the record shows Burnett was not strictly "eye-for-an-eye" in his view of the death penalty.

Succinctly stated, defendant's cause challenge was based on Burnett's inability to formulate legal hypothetical situations to illustrate his beliefs about the effect of mitigating factors, When provided with examples, however, Burnett displayed a commitment to limiting his decisions to the evidence presented and applying the law given to him. Defendant fails to demonstrate that the trial court abused its discretion in denying this cause challenge.

Julie Campbell: Campbell, an administrative assistant for the Louisiana Department of Wildlife and Fisheries law enforcement division, agreed to consider any and all mitigating factors presented to her, and believed in a high standard of proof when contemplating the imposition of the death penalty. The presence of DNA evidence as well as its proper and reliable collection were important to her. However, Campbell opined she would never automatically vote for the death penalty, and a large amount of supporting evidence would be necessary for her to find defendant guilty and impose even life imprisonment. Despite her place of employment, she stated she had formed no opinion about defendant's

guilt and had received no inside information from her supervisor, a participant in the Serial Killer Task Force. While she had occasion to read faxes sent to participatory law enforcement agencies, she could not recall the content of any. She admitted she read an internet profile of the South Louisiana Serial Killer, but stated she had dismissed it because she found parts contradictory. Defendant's arrest did not affect her life, although she did say she carried mace given to her by a colleague. She knew of defendant's West Baton Rouge Parish conviction, but indicated she could set aside her knowledge of that conviction when considering the facts of the present case. Moreover, Campbell assured the court she would not favor police officer witnesses with greater credence than any other witness.

Defendant challenged Campbell for cause based on her employment and because she sought information about the serial killer. As noted above, when queried about her position with her office and her dismissal of the information sought about the serial killer, it is evident neither would affect Campbell's judgment about the State's case against the defendant. Therefore, we find the trial court did not abuse its discretion in denying defendant's cause challenge.

Joseph McGee: Defendant contends McGee should have been removed for cause because his voir dire testimony showed he would automatically vote for the death penalty notwithstanding any mitigation evidence the defense might introduce. Notwithstanding the trial court's denial of

defendant's cause challenge and the opportunity to exercise his peremptory challenges, defendant chose not to exercise a peremptory challenge. Because defendant did not exercise an available peremptory challenge against McGee, any erroneous ruling by the trial court did not deprive defendant of a peremptory challenge against this prospective juror. Thus, defendant waived his right to assert this claim on appellate review. *State v. Blank,* 955 So. 2d at 113; *State v. Connolly,* 700 So. 2d at 818; *State v. Bourque,* 622 So. 2d at 229-30.

Kathy Morgan: Morgan admitted she had followed the case in the news, and that she had formed an opinion that defendant was guilty based on media coverage. However, she stated she could set that opinion aside and make a determination of defendant's guilt based on the evidence presented. She further acknowledged she could consider all mitigating factors presented to her with sufficient supporting evidence. She recognized DNA evidence was a powerful tool because it had exonerated many wrongfully convicted people.

During the serial killer investigation, Morgan admitted she was concerned and was on the lookout for the "white man in a white pickup truck" touted as the suspect throughout most of the search for the serial killer. She admitted relief when the defendant was arrested because she felt the police had captured the serial killer. She also forthrightly told the court she was aware of the defendant's West Baton Rouge Parish conviction and the sentence imposed.

Defense counsel challenged Morgan because of her knowledge of the defendant' s West Baton Rouge Parish conviction, as well as for her pre-formed opinion of defendant's guilt. After reviewing Morgan's testimony, we observe, as did the trial court, that many of her answers showed she could set aside any pre-formed opinion she may have, and she professed she could carefully examine evidence presented during both phases of trial. Morgan's testimony further demonstrated she was aware media reports are often incorrect. We find defendant failed to demonstrate the trial court abused its discretion in denying his cause challenge.

Stephen Vangeffen: Vangeffen, an engineer, had seen news reports about the defendant, and had formulated an opinion that defendant was guilty based upon those reports. However, he stated he could set aside his opinion and any information derived from media accounts, and instead focus on any evidence presented to him at trial. Vangeffen repeatedly assured both the State and the defense he could consider mitigating circumstances during the penalty phase as well. Furthermore, the record shows Vangeffen understood DNA evidence is circumstantial, and its value was dependant upon the facts and collection procedures utilized. On the other hand, Vangeffen was aware of the West Baton Rouge Parish conviction and felt relieved when the defendant was arrested.

Defense counsel challenged Vangeffen for cause based on his familiarity with the defendant's criminal prosecution in West Baton Rouge Parish

and his alleged predisposition to finding defendant guilty. After reviewing Vangeffen's testimony, the trial court disagreed, referencing the juror's repeated declarations that he could put those factors aside and examine the evidence anew. In fact, Vangeffen recounted a personal experience involving his place of employment, Dow Chemical, in which he noticed information reported in the news regarding a matter familiar to him that was inconsistent with what he had observed. Defendant again failed to demonstrate the trial court abused its discretion when it denied defendant's cause challenge.

Ronald Venable: Venable admitted he generally followed the defendant's case, but stated he held no opinion about defendant's guilt. He further agreed he could set aside anything he had previously heard in press reports. Venable was open to consideration of mitigation evidence, and he was clear he could accept evidence of mental retardation or diminished capacity. Finally, he opined he could equally consider a life sentence or the death penalty, and would respect the opinions of his fellow jurors.

The defense challenged Venable because he had heard of defendant's West Baton Rouge Parish conviction. We note that despite Venable's knowledge of defendant's prosecution in West Baton Rouge Parish, he declared the conviction would have no effect on his thinking in the present prosecution in East Baton Rouge Parish. Venable's answers were direct and he showed little hesitation when he stated he could set aside extraneous information. Defendant failed to demonstrate the trial court

abused its discretion when it denied the defendant's cause challenge.

William Blades: Blades, the last of the defense's cause challenges, admitted he had generally followed the defendant's case, but he felt he could disregard any information he had previously heard about it. Blades further stated he could presume defendant's innocence, and he would consider mitigating factors during sentencing. Furthermore, he acknowledged he could separate the commission of a crime and the capacity to be held responsible for it.

Blades was challenged because he had heard of defendant's West Baton Rouge Parish conviction. In addition to Blade's assurances detailed above, the record shows Blades had 15-year's experience as a union steward where he made informed, unbiased decisions. He stated he was accustomed to following rules, leaving personal feelings out of those decisions, and that "things are not always as they seem" when listening to witness accounts. Viewing the totality of Blades's voir dire examination, we find the defendant fails to demonstrate the trial court abused its discretion in denying his cause challenge.

Expert Testimony

In his next argument, defendant contends the trial court erroneously qualified several expert witnesses and failed to limit some of their testimony, Under LA. CODE EVID. ANN. art. 702, a witness may be qualified as an expert by "knowledge, skill,

experience, training, or education." As a general matter, trial courts have broad discretion in determining the competence of an expert witness, and rulings on the qualifications of an expert will not be disturbed by a reviewing court absent an abuse of that discretion. *See State v. Trahan*, 576 So. 2d 1, 8 (La. 1990); *State v. Watson*, 449 So. 2d 1321 (La. 1984); *State v. Montana*, 421 So. 2d 895, 899 (La. 1982); *State v. Wheeler*, 416 So.2d 78, 80 (La. 1982); LA. CODE CRIM. PROC. ANN. art. 702, cmt (d); *see also Wigmore, On Evidence, II* 560-561 (3d Ed.). However, an expert witness is not permitted to testify to the ultimate issue of defendant's guilt. See *State v. Jones,* 558 So. 2d 546 (La. 1990); LA. CODE EVID. ANN. art. 704.

The first expert witness, Mark Kurowski, a tool mark and fracture analysis expert testified to "fracture matching" a piece of telephone cord from Diane Alexander's house that was recovered 500 feet from Pamela Kinamore's body. Notwithstanding the present claim that his analysis was "junk science," trial counsel stipulated to Kurowsky's expertise without objection or questioning. Thus, defendant is barred from challenging the court's action. LA. CODE CRIM. PROC. ANN. art. 841; *State v. Taylor*, 93-2201 (La. 2/28/96) 669 So. 2d 364, 367-69 (reviving contemporaneous objection rule for guilt stages in capital cases).

Defendant further claims the State's DNA experts were improperly permitted to testify about the statistical significance of the DNA evidence. Defendant neither explains how the experts were

unqualified to render such opinions, nor does he offer anything other than a generalized assertion of fault in their methodology. The testimony to which defendant cites illustrates his argument appears to be that of a DNA scientist explaining how she could exclude a theoretical 3.6 quadrillion people from being the donor of the DNA found at all of the crime scenes. Defendant shows no error in the trial court permitting such expert testimony.

Finally, defendant claims the State's DNA experts improperly testified about the identity of the South Louisiana Serial Killer. The testimony produced during the pre-trial and trial stages, however, does not support this claim. Instead of declaring defendant guilty, each DNA expert painstakingly distinguished their testimony from an outright conclusory statement of guilt. The testimony across-the-board from each expert was the DNA recovered from the various crime scenes "was consistent with" that of defendant, or that the defendant was the source of the DNA. At no time did an expert testify defendant committed the crimes. This claim is without merit.

Sequestration

Next, defendant alleges error where the trial court permitted State witnesses and families of the victims to remain in the courtroom during trial proceedings.

LA. CODE EVID. ANN. art. 615 governs the sequestration of witnesses and provides, on a party's

request, that a judge must order witnesses excluded from the courtroom and to "refrain from discussing the facts of the case with anyone other than counsel in the case."

Here, initially trial counsel waived objection to the presence of any family member who was not a guilt phase witness. The one family member who was a guilt phase witness, Gina Green's sister, was only scheduled to testify about having seen Gina Green the day of her abduction and murder. Defense counsel waived objection to her as well. Later, defense counsel objected to the presence of the family members of other victims.

Even assuming trial counsel's initial waiver of objection was due to a misunderstanding of the prosecutor's statement, "I have a lot of family members here," and thus did not waive the issue on appeal, LA. CODE CRIM. PROC. ANN. art. 841, defendant still shows no error. Defendant fails to identify any of the family members of other victims who testified, even though the State does. Of the witnesses who testified, only one was asked any questions on cross-examination, and all testified as to their encounters with the victims shortly before they were murdered, or their experience of interrupting defendant during the attempted murder. Furthermore, defendant makes no claims as to how he was prejudiced by their presence in the courtroom during the testimony of other witnesses. This claim is without merit.

Defense's Cross-Examination of Witnesses

Defendant next claims the trial court improperly limited his cross-examination of State witnesses. The three witness cross-examinations involve Diane Alexander, Natasha Poe, and John Colter.

An essential component of the defendant's Sixth Amendment right of confrontation is cross-examination of a witness with regard to his or her bias and interest in the case. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065 (1965); *Giglio v. United States,* 405 U.S. 150, 92 S.Ct. 763 (1972); LA. CONST. ANN. art. I, § 16; LA. CODE EVID. ANN. art. 607 (C),(D) (authorizing admission of intrinsic and extrinsic evidence to show interest, bias or corruption); *State v, Clark*, 492 So. 2d 862, 869 (La. 1986); *State v. Nash*, 475 So. 2d 752, 754-755 (La. 1985); *State v. Trahan,* 475 So. 2d 1060, 1062-1063 (La. 1983); *State v. Rankin*, 465 So.2d 679, 681 (La. 1985); *State v. Sweeney*, 443 So.2d 522, 529 (La. 1983); *State v. Brady*, 381 So .2d 819, 821-822 (La. 1980).

The first cross-examination defendant complains of involves Diane Alexander. When defense counsel asked Alexander if she had attempted to seek the State's help in granting her son[6] parole, the State's objection on relevancy

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[6] Although the record is not clear, it does not appear the son referred to was Herman, the son who interrupted defendant's attack on his mother. This supposition is supported by the fact that the defense did not use this information in its

grounds was sustained. At a bench conference to probe defendant's purpose for this line of questioning, the trial court discovered defendant's trial counsel had no reason to believe the witness had asked for such help, and was merely "fishing." Notwithstanding defendant's claim now that there was a newspaper article reporting such a request, counsel did not present that information to the trial court. Moreover, the witness's identification of defendant occurred long before any such alleged request was made. Accordingly, defendant fails to show the trial court erred in limiting the scope of his questioning regarding this matter.

The second witness defendant complains of was Natasha Poe, one of the forensic DNA analysts. After defense counsel asked Poe if she had read a journal article that described a situation in which two unrelated people had the same genetic profile, she responded she had not read such an article. The State then objected when defendant began to ask another, related question. The trial court sustained the objection, stating the question had already been asked and answered, the article was hearsay, and suggested that anything else would call for speculation. After carefully examining this issue, we find defendant shows no error in the trial court's evidentiary ruling.

Finally, the trial court sustained a hearsay objection after defense counsel asked John Colter of

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cross-examination of Herman.

the Baton Rouge Police Department if another reputed serial killer, Sean Gillis, had told him he intended to rape someone. Although defendant may allege someone else committed the crime, no hearsay exception was proffered, and defendant does not show error. *Compare State v. Van Winkle,* 94-0947, p. 5 (La. 6/30/95), 658 So.2d 198, 201 ("A criminal defendant has the constitutional right to present a defense."). Accordingly, we find this assignment of error lacks merit.

Photographic Lineup

Defendant next asserts the trial court erred in failing to suppress a photographic lineup in which Diane Alexander chose his photo as the one depicting her attacker. Defendant claims that in response to Alexander's description of her attacker as a light skinned black male, police intentionally assembled a photographic lineup of five men darker than defendant.

From the outset, we observe defendant fails to show trial counsel made a specific objection to the admission of the photographic lineup, beyond claiming that it was an "unconstitutional lineup." As a result, because defendant failed to particularize the constitutional basis for his objection, he has waived the claim on appeal. LA. CODE CRIM. PROC. ANN. art. 841; *Taylor*, 669 So. 2d at 367-69; *see also, State v. Western,* 355 So. 2d 1314, 1320 (La. 1978) ("An assignment of error based upon an objection without an identified basis presents nothing for our review.").

Nonetheless, we observe the defendant has the burden of proof on a motion to suppress an out-of-court identification. LA. CODE CRIM. PROC. ANN. art. 703(D). To suppress an identification, a defendant must first prove the identification procedure was suggestive. *State v. Prudholm,* 446 So. 2d 729, 738 (La. 1984). An identification procedure is suggestive if, during the procedure, the witness's attention is unduly focused on the defendant. *State v. Robinson,* 386 So. 2d 1374, 1377 (La. 1980). However, even when suggestiveness of the identification process is proved by the defendant or presumed by the court, the defendant must also show there was a substantial likelihood of misidentification as a result of the identification procedure. *State v. Prudholm,* 446 So. 2d at 738.

The United States Supreme Court held in *Manson v. Brathwaite,* 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977), that despite the existence of a suggestive pretrial identification, an identification may be permissible if there does not exist a "very substantial likelihood of irreparable misidentification." Under *Manson*, the factors which courts must examine to determine, from the totality of the circumstances, whether the suggestiveness presents a substantial likelihood of misidentification include: (1) the witness's opportunity to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of his prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation. *Manson*, 97 S.Ct. at 2254.

In this case, it is clear Alexander had an extended time in which to view defendant during the course of his attack on her. The record shows she was able to remember several minor details about the attack and her attacker, and described defendant with such sufficiency to generate a composite sketch that engendered four separate tips identifying defendant. Alexander was positive in her identification, identified her assailant less than a year after the attack, and again identified him in court. Moreover, albeit a black and white photocopy, the photographic lineup introduced into evidence does not appear to single out defendant as the fairest skinned member. We further observe Alexander also positively identified defendant before she was aware he was linked to her assault through DNA evidence. Defendant's claim, even if preserved by a general objection, is without merit.

Guilt Phase: State's Inflammatory Statements

Defendant next claims the State made improper, inflammatory statements throughout the trial. Specifically, defendant points to 22 places in the record where he claims the State made improper arguments or statements regarding subjects from placing jurors in the victim's shoes to confusing jurors about the role of mitigating factors.

From the outset, we note defendant, with the exception of two of the alleged improper statements, failed to lodge a timely objection. Thus, defendant waived the claim on appeal to all, but those two statements. LA. CODE CRIM. PROC. ANN. art. 841;

Wessinger, 98-1234, 736 So. 2d at 180; *Taylor*, 669 So.2d at 367-69.

With regard to the remaining two comments, both made during the guilt phase, defendant claims the State improperly permitted so many irrelevant statements about the lives of the "other crimes" victims that it impermissibly constituted prejudicial victim impact statements.

In *State v. Bernard,* this Court held:

> [The State may introduce] ... some evidence of the murder victim's character and of the impact of the murder on the victim's survivors is admissible as relevant to the circumstances of the offense or the character and propensities of the offender. To the extent that such evidence reasonably shows that the murderer knew or should have known that the victim, like himself, was a unique person and that the victim had or probably had survivors, and the murderer nevertheless proceeded to commit the crime, the evidence bears on the murderer's character traits and moral culpability, and is relevant to his character and propensities as well as to the circumstances of the crime. However, introduction of detailed descriptions of the good qualities of the victim or particularized narrations of

> the emotional, psychological and economic sufferings of the victim's survivors, which go beyond the purpose of showing the victim's individual identity and verifying the existence of survivors reasonably expected to grieve and suffer because of the murder, treads dangerously on the possibility of reversal because of the influence of arbitrary factors on the jury's sentencing decision.

State v. Bernard, 608 So. 2d 966, 972 (La. 1992); *see also State v. Allen,* 03-2418 (La. 6/29/05), 913 So. 2d 788.

The two lines of questioning involved the boyfriend of Yoder and a close friend of Colomb. Yoder's boyfriend testified about his relationship with her, a trip taken together shortly before her murder, her studies, her hometown, her family, his movements and observations during the time immediately before and after she disappeared, and her hobbies. In the other statement, Trineisha Dene Colomb's best friend testified about the victim's intelligence, her desire to join the Marine Corps, her hobbies, and her education.

Both questions to victims' family members were meant to "humanize" the victims in a limited manner permitted by *Bernard*. In both instances the trial court overruled the objection, but correctly advised the State to limit the scope of the questioning. The record shows testimony was

neither presented that described either the emotional impact of the victims's loss on the survivors nor detailed the victims's characters. Defendant's claims are meritless.[7]

Penalty Phase Instructions

Next, defendant claims the penalty phase jury instructions erroneously instructed jurors they were not required to consider defendant's mental impairments as mitigating factors.

Again, our review of the record shows defendant failed to object to the instruction and thus waived the claim. LA. CODE CRIM. PROC. ANN. art. 801 (C); LA. CODE CRIM. PROC. ANN. art. 841; *State v. Draughn,* 950 So. 2d at 622; State v. Wessinger, 736 So.2d at 180.

Penalty Phase Verdict Form

In this assignment, defendant asserts the penalty phase verdict form is unconstitutional because it does not require the State to prove that death is an appropriate punishment beyond a reasonable doubt and places the burden of proving mitigation on a defendant. Specifically, defendant claims that although the verdict form used in this case conformed with the statutory requirements of

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[7] Furthermore, even though defendant does not explain whether the State provided pre-trial notice of its intent to provide testimony about the character of the victims, he does not make issue of it here. See *State v. Bernard,* 608 So. 2d 966 (La. 1992).

LA. CODE CRIM. PROC. ANN. art. 905.7, it offended constitutional principles by limiting the jury's consideration of mitigation to that offered by the defense.

As an initial matter we note trial counsel did not object to the verdict form, and thus failed to preserve the issue for review. LA. CODE CRIM. PROC. ANN. art. 841; *State v. Wessinger,* 736 So. 2d at 181.

Notwithstanding defendant's claims to the contrary, nothing suggests the statutory language used in the verdict form misled the jury, and accordingly defendant fails to show it introduced an arbitrary factor into the jury's deliberations. In Louisiana, a jury is not required to find beyond reasonable doubt that death is the appropriate punishment. *State v. Koon,* 96-1208 (La. 5/20/97), 704 So. 2d 756, 772-73 ("Louisiana is not a weighing state. It does not require capital jurors to weigh or balance mitigating against aggravating circumstances, one against the other, according to any particular standard.").

The verdict form utilized in the case sub judice tracks LA. CODE CRIM. PROC. ANN. art. 905.7, which employs the word "offered." The final phrase of the verdict form used in the present case adds, over and above the statutory phrasing: "Aggravating circumstance unanimously found beyond a reasonable doubt:" Trial Tr., Vol. XII, 2917. This argument lacks merit.

Commutation Instruction

Next, defendant claims the commutation instruction found in LA. CODE CRIM. PROC. ANN. art. 905.2(B) invites the jury to decide a capital defendant's sentence on the basis of arbitrary factors irrelevant to its sentencing decision. He further suggests LA. CODE CRIM. PROC. ANN. art. 905.2 is unconstitutional. Thus, defendant urges that this Court to reconsider its ruling in *State v. Loyd*, 96-1805 (La. 2/13/97), 689 So. 2d 1321.

Again, trial counsel failed to object to the instruction, and thus waived the claim on appeal. LA. CODE CRIM. PROC. ANN. art. 801(C); LA. CODE CRIM. PROC. ANN. art. 841; *State v. Draughn,* 950 So. 2d at 622; *State v. Wessinger,* 736 So. 2d at 180.

Nevertheless, in *State v. Loyd,* this Court held "Louisiana's instruction is an even-handed one which accurately informs jurors that a death sentence as well as a life sentence remains subject to executive revision." *State v. Loyd,* 689 So. 2d at 13 31. We rejected the same argument raised by defendant herein in *State v. Wessinger,* 736 So.2d at 190, and reject it here as well.

Surrebuttal Evidence

In his next assignment of error, defendant contends the trial court's refusal to allow him to present surrebuttal testimony to counter new issues the State introduced on cross examination and in

rebuttal testimony rendered unreliable the jury's failure to determine defendant is mentally retarded. Defendant contends Dr. Hoppe's extensive references to defendant's test scores and interviews with co-workers, his critique of Dr. Gouvier's WAIS scoring, and his allegedly novel method of averaging WAIS scores warranted the opportunity to call surrebuttal witnesses.

The State has the right to rebut defense evidence. LA. CODE EVID. ANN. art. 611 (E). Rebuttal evidence explains, repels, counteracts, or disproves, and it may be used to strengthen the State's original case. *State v. Huizar,* 414 So. 2d 741, 751 (La. 1982). The State may not, however, reserve part of its case-in-chief for rebuttal testimony after the defense had presented its case. *State v. Narcisse*, 426 So. 2d 118, 125 (La. 1983).

When new facts or issues are adduced in rebuttal, a trial court has the discretion to permit the introduction of additional evidence prior to closing argument. LA. CODE CRIM. PROC. ANN. art. 765(5). An abuse of this discretion resulting in prejudice to a defendant's presentation of a defense or impingement of his right to impeach the credibility of State witnesses constitutes reversible error. LA. CONST. ANN. art. I, § 16; *State v. Harper,* 93-2682 (La. 11/30/94), 646 So. 2d 338, 342-343; *State v. Harrison*, 553 So. 2d 422, 425-426 (La. 1989), citing 6 Wigmore, *Evidence,* §1874 (Chadbourne Rev. 1974), LA. CODE EVID. ANN. art. 611(E) and *Handbook on Louisiana Evidence*

Law, Pugh, Force, Rault & Triche, Authors' Notes to Article 611(E) (West 1995).

First, we note defendant raised issues about defendant's test scores and co-worker interviews during direct examinations. Defense counsel broached the subject of defendant's test scores when mentioning his failure to pass a written commercial driver's license examination after he had passed it once as proof of his cheating. Trial counsel also made extensive references to defendant's attendance in special education programs and his school history. Introducing test scores obtained during those years scarcely interjected new facts or issues. Defendant's safety examination results were of a similar nature, especially when coupled with defendant's contention he could barely function in his jobs, and scored poorly on job examinations. The co-workers testified to defendant's abilities and competencies at his job that belie this contention.

Second, as to Dr. Hoppe's critique of the WAIS scoring, a review of the record shows he was simply referring to the relatively low level of confidence (68%) in Dr. Gouvier's WAIS scoring. In the alternative, Dr. Hoppe suggested a higher level of confidence could be achieved by expanding the range in which the score could be reasonably expected to fall. A mere clarification of the statistical accuracy of defendant's expert is neither the introduction of anything new nor should it have been unexpected in a procedure heavily reliant upon statistics.

Finally, at best Dr. Hoppe's method of averaging nine IQ test scores is suspect. However, the record shows defendant had full opportunity to cross-examine Dr. Hoppe on his methodology, or alleged lack thereof, and did so. In any event, defendant includes a declaration from an expert[8] that Dr. Hoppe's technique borders on the unethical, and that any amount of surrebuttal testimony would have rendered it meaningless. Even assuming *arguendo* everything defendant's new expert postulates in his statement is true, the result in the present case remains the same. Excluding Dr. Hoppe's suspect IQ averaging, there still remains an abundance of either uncontroverted, or unsuccessfully controverted, evidence on the question of defendant's alleged mental retardation. No amount of evidence regarding the calculation of defendant's IQ scores can dislodge the abundant evidence presented at trial depicting defendant's adaptive skills that removed him from any classification of mental retardation. Defendant fails to show how the trial court abused its discretion in denying his request to present surrebuttal testimony, or how he was prejudiced as a result of that denial. Defendant's claim lacks merit.

Defense Mitigation Testimony

Defendant also contends the trial court erred when it improperly sustained a State objection to a

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[8] In a supplemental motion for a new trial, defendant presented a statement by Timothy J. Deming, Ph.D.D. critiquing Dr. Hoppe's techniques used to establish defendant's IQ.

question addressed to a defense mitigation witness. Specifically, defendant claims trial counsel should have been allowed to ask his (defendant's) sister on redirect why he should not be executed.

LA. CODE CRIM. PROC. ANN. art. 905.2(A) states that:

> The sentencing hearing shall focus on the circumstances of the offense, the character and propensities of the offender, and the victim, and the impact that the crime has had on the victim, family members, friends, and associates.

The question complained of addressed none of the areas broached in art. 905.2. When the State objected during a bench conference that it had expressly counseled its witnesses not to offer their personal opinions why defendant should die, and threatened to recall all of them for that purpose if defense counsel succeeded with this line of questioning with defendant's sister, the trial court suggested "the appropriate way is to ask about specific characteristics or propensities of the defendant that she knows about, but not give her opinion of what she wants because that is irrelevant." Defense counsel responded, "Okay," and resumed questioning of defendant's sister by asking her about some of defendant's good qualities. By choosing to abide by the trial court's suggestion, counsel thereby acquiesced to the trial court's ruling

and cannot now complain about it.[9] This claim is without merit.

Incomplete Record

In his final assignment of error, defendant claims the appellate record is incomplete. Specifically, defendant claims the record is missing pleadings and transcripts, is marred by incorrect minute entries, and is missing instructions given to prospective jurors prior to the beginning of voir dire. As a result, defendant alleges the incomplete state of the record denies him his constitutional rights.

LA. CONST. ANN. art. I § 19 guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." Additionally, LA. CODE CRIM. PROC. ANN. art. 843 provides:

> In felony cases, and on motion of the court, the state, or the defendant in misdemeanor cases tried in a district, parish, or city court, the clerk or court stenographer shall record all of the proceedings, including the examination of prospective jurors, the testimony of witnesses, statements, rulings, orders, and charges by the court, and

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[9] For a discussion of this issue in a setting in which the assignment of error was preserved and the application of the harmless error rule of analysis, see *State v. Manning*, 03-1982 (La. 10/19/04), 885 So. 2d 1044, 1098-99.

objections, questions, statements, and arguments of counsel.

Although this Court has found reversible error when material portions of the trial record were unavailable or incomplete, a "slight inaccuracy in a record or an inconsequential omission from it which is immaterial to a proper determination of the appeal" does not require reversal of a conviction. *State v. Brumfield,* 96-2667 (La. 10/28/98), 737 So. 2d 660,669; *State v. Parker,* 361 So. 2d 226, 227 (La. 1978); *State v. Ford,* 338 So. 2d 107, 110 (La. 1976). A defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. *State v. Castleberry,* 98-1388 (La. 4/13/99), 758 So. 2d 749, 773 (citing *State v. Hawkins,* 96-0766 (La. 1/14/97), 688 So. 2d 473; *State v. Allen*, 95-1754 (La. 9/5/96), 682 So.2d 713, 722).

Defendant neither names most of the documents he claims are missing nor does he show any resulting prejudice by their unintentional omission. This claim is without merit.

No. 07-1536

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

DERRICK TODD LEE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Supreme Court

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Defendant Derrick Todd Lee was charged by indictment on June 25, 2003, with the May 31, 2002, first degree murder of Charlotte Murray Pace, a violation of La. R.S. 14:30. (Vol. I R. p. 98.) On July 2, 2003, defendant, represented by counsel, waived formal arraignment and entered his own plea of not guilty as charged.

Defendant filed many pretrial motions, and extensive hearings on those motions were held. Pretrial motions filed by the defense included the following: Motion to Transfer, various funding motions, Motion to Preserve Evidence and Portions of Substances for Independent Testing, *Simpson* Motion to Recuse the Trial Court, Motion for Production of Initial Offense Report, Motion for Discovery of Information Needed for Fair Trial, Motion to Discovery and Disclose Evidence Favorable to Defense, Motion for Change of Venue on Basis of Pretrial Publicity, Motion for Bill of Particulars, Motion for Notice of Intent to Introduce "Victim Impact" Evidence and to Limit "Victim Impact" Evidence, Motion for Production of Records of Arrests and Convictions and NCIC Reports and for Production of a List of Potential Witnesses to be Called by the State, Motion for DNA Testing Discovery, Notice of Intention to File Other Motions, and Motion to Suppress Statements. The state filed discovery motions, Notices of Intent and Request for Hearings to Introduce Other Crimes Evidence in Accordance with L.C.E. art. 404(B) and *State v. Jackson*, and Motion to Require Defense

Counsel to Certify Qualification to Represent Defendant in Capital Case.

Defendant's trial began on September 13, 2004, with voir dire, which took place on September 13, 14, 15, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, 2004. The jury was sworn as a panel on Monday, October 4, 2004, after which time the trial court gave preliminary instructions, the indictment and minute entry of the arraignment was read, opening statements by both sides were made, and testimony began. The state rested its case-in-chief on October 11, 2004. The defense presented no evidence and rested on that same date. Closing arguments, the trial court's instructions, and deliberations on the guilt phase took place on October 12, 2004. The jury deliberated from 2:47 p.m. to 3:30 p.m., when they returned to the courtroom with requests. The jury resumed deliberations at 3:33 p.m. and returned with a unanimous verdict of guilty of first degree murder as charged at 4:16 p.m.

The penalty phase of trial took place on October 13, and 14, 2004. During this phase, the state called three witnesses for its case-in-chief: Casey Pace, Sam Pace, and Ann Pace. The defense at the penalty phase called seven witnesses to testify: Jesse Perkins, Mike Thornhill, Dorothy Temple, Nancy Dreher, Tarshia Fontenot, Dr. Drew Gouvier (an expert neuropsychologist), and Dr. Sarah Deland (an expert forensic psychiatrist). On rebuttal, the state called Patrick Lawless, Gary Robillard, Dr. Donald Hoppe (an expert clinical psychologist), and Dr. Robert Blanche

(an expert state certified psychiatrist). The jury deliberated one hour and thirty-three minutes before returning a verdict of death in this case. (Vol. I R. p. 93.) The aggravating circumstance the jury unanimously found beyond a reasonable doubt was aggravated rape. (Vol. XXXVIII R. p. 9403.)

The trial court denied defendant's motion for a new trial on December 10, 2004. On that same date, the trial court sentenced defendant to death by lethal injection. Defendant directly appealed to the Louisiana Supreme Court. He asserted thirty-one assignments of error: (1) defendant's DNA was obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures and also as set forth in Louisiana's Constitution Article 1, Section 5; (2 and 3) the trial court incorrectly denied defendant's motion for change of venue; (4, 5, and 6) the trial court incorrectly denied challenges for cause during voir dire; (7 and 8) the trial court incorrectly excused jurors during voir dire; (9, 10, and 11) the trial court's admission of other crimes evidence violated defendant's rights to due process, a fair trial, and humane and proportionate punishment; (12) the trial court's rulings on funding issues deprived defendant of a fair trial, effective assistance of counsel, the right to present a defense, and humane and proportionate punishment; (13) the jury's decision on defendant's mental retardation and the death sentence are contrary to the evidence and thus violate the Eighth Amendment and Article 1, Section 20 of the Louisiana Constitution; (14) defendant's constitutional rights

were violated by the trial court's refusal to permit the defense to present surrebuttal evidence regarding defendant's mental retardation claim; (15) La. Code Crim. P. art. 905.5.1 violates the Eighth Amendment; (16 and 17) the penalty phase verdict form on mental retardation and jury instructions violated defendant's constitutional rights; (18) defendant's state and federal constitutional rights were violated by the trial court's penalty phase instructions regarding intellectual impairment; (19) the penalty phase verdict form prescribed by La. Code Crim. P. art. 905.7 violates defendant's federal and state constitutional rights to fair and proportionate punishment; (20) defendant's state and federal constitutional rights were violated by the prosecutor's allegedly improper and inflammatory statements; (21) allotment of cases in the 19th Judicial District Court in Louisiana violated due process; (22) the short-form indictment violated defendant's state and federal constitutional rights; (23) the trial court erred in qualifying the state's "fracture match" expert Mark Kurowsky; (24) the trial court erred in qualifying the state's DNA experts; (25) the trial court erred in allowing the state's DNA experts to testify on the ultimate issue in the case; (26) the trial court improperly curtailed defendant's cross-examination; (27) the trial court erred in sustaining the state's objection to a question posed to defendant's sister as to why she believed defendant should not be executed; (28) irregularities in the assembly of the jury venire violated defendant's state and federal constitutional rights; (29) the trial court allowed violation of the rule of sequestration by

allowing family members of the victims of other crimes to remain in the courtroom regardless of whether they were also to serve as witnesses; (30) the trial court erred in denying the motion to suppress the photographic lineup shown to Diane Alexander; (31) the trial court's commutation instruction violated defendant's right to due process and a reliable and proportionate sentence under the state and federal constitutions; and (32) the appellate record is incomplete. The Louisiana Supreme Court upheld defendant's conviction and sentence. *State v. Lee*, 05-2098 (La. 1/16/08), 976 So.2d 109, *rehearing denied* 07-1288 (La. 3/7/08), 977 So.2d 896.

Defendant has presently filed a writ application with this Honorable Court from his direct appeal in state court. He contends this court should grant certiorari (1) to resolve issues surrounding the scope of the inevitable discovery exception to the exclusionary rule and its application to the present case, wherein DNA evidence was taken from defendant, and (2) to address the subject of venue due to pretrial publicity. The state maintains the Louisiana Supreme Court correctly decided these issues; therefore, relief to defendant should be denied.

STATEMENT OF THE FACTS

On May 31, 2002, at approximately 2:00 p.m., Rebecca Yeager found her roommate Charlotte Murray Pace brutally murdered in their Sharlo

Avenue apartment in Baton Rouge. Murray was a beautiful twenty-two year old who had just received her MBA from LSU. She planned to continue her employment at LSU during the summer before beginning her new career in Atlanta that fall.

Upon finding Murray's body, Rebecca telephoned 911, and homicide detectives and crime scene personnel were dispatched to the scene. There was no sign of forced entry, and Murray's telephone and part of her iron were missing. Crime scene personnel documented blood spatters beginning in the den, continuing through the hallway and into the bathroom and Rebecca Yeager's bedroom, where Murray's body was found. There was a tremendous amount of blood in Rebecca's bedroom on the walls, the bed, and around Murray's body. Her body was found lying on the floor next to the bed. She was completely nude from the waist down, and her blouse and bra were pulled up above her breasts. She had been stabbed eighty-one times. She had a gaping hole in her neck and had been bludgeoned with an iron.

Crime scene specialists took DNA swabs from Murray's body at the scene and bagged her hands to protect them from contaminates in order to preserve the evidence. Later her body was transported to the coroner's office, where the forensic pathologist collected evidence for the rape kit and clipped and submitted Murray's fingernails.

The police interviewed witnesses but had few leads in this matter. On July 3, 2002, Julia Naylor,

the State Police DNA analyst that worked this case, obtained a complete DNA profile from a swab taken from Murray's left buttock. She also found the same profile mixed with the victim's profile on the cervical swab taken in the rape kit. Lastly at a later point in time, Reliagene performed Y-STR DNA analysis on the fingernail clippings from Murray and obtained a profile. Although police had the genetic identity of the murderer as early as July 3, 2002, his DNA profile was not in the CODIS system; therefore, authorities were unable to put a face on the profile.

Angela Ross, another Louisiana State Police DNA analyst, had been previously assigned to test DNA evidence from the September 23, 2001, murder of Gina Green. On July 8, 2002, Angela Ross and Julia Naylor were on a break at work, and the subject arose of these two murders. One of their colleagues suggested that they compare the DNA profiles from each murder. They found the profiles to be identical.

Gina Green was an attractive, successful forty-one-year-old nurse. She was found raped and strangled in her Stanford Avenue residence in Baton Rouge. Just as in Murray's case, there were no signs of forced entry. Crime scene personnel secured the blouse Gina had been wearing and submitted it for DNA analysis.

Additionally, the murderer had removed certain items from Gina's home including her cell phone, the shorts she was wearing when she was attacked, a dish towel, and her purse. Police officers recovered

these items dumped behind a warehouse on Choctaw Street in Baton Rouge. A complete profile was obtained by Angela Ross from a spot of blood discovered on Gina's blouse. Ross also obtained a consistent profile from the kitchen towel and a mixture of DNA on the shorts containing a profile consistent with the profile found on the other items.

On July 9, 2002, Diane Alexander, a nursing student in Breaux Bridge, Louisiana was attacked. Ms. Alexander was home getting ready for work when a stranger, who identified himself as Anthony, appeared at the door to her mobile home and requested help to find the Montgomery's residence. When Ms. Alexander indicated that she did not know the Montgomerys, he asked to use the telephone, and she took it to him. He then asked her if her husband might know the man that he was seeking. When Diane responded that her husband was not home, the stranger's demeanor changed, and he forced his way into her trailer. He attempted to rape her but could not sustain an erection. He bludgeoned her and attempted to strangle her with a telephone cord. As Diane faded in and out of consciousness, her son Herman arrived at the residence. Upon hearing the car approach on the gravel driveway, the attacker ran out of the back door. Herman noticed the unfamiliar car parked at the trailer. He described it as a gold Mitsubishi Eclipse with a "Hampton has it" license plate. He also saw a phone cord hanging from the window. Herman found his mother lying in a pool of blood. She had a skull fracture and was rushed to the

hospital where she spent five days. The attacker took certain items from the house, including the handset from the phone, Diane's panties, and a piece of telephone cord. Diane Alexander gave a detailed description of her attacker and aided law enforcement in preparing a composite sketch. Unfortunately, since this Breaux Bridge attack occurred in a separate jurisdiction from the Baton Rouge murders, no connection was initially made by law enforcement between Diane Alexander's attack to the murders of Charlotte Murray Pace and Gina Green.

Just three days after Diane Alexander was attacked, Pam Kinamore, an attractive, successful forty-four-year-old antique shop owner was murdered. Pam's husband, Byron, arrived at their Briarwood Place home in Baton Rouge about 11:45 p.m. on July 12, 2002. Byron found a bathtub full of water in the bathroom, spots of blood on a rug in their bedroom, and a minor disturbance of the furnishings in the room. Pam was gone. Three days later, Pam Kinamore's maggot-infested body was found dumped in the woods off the Whiskey Bay exit of Interstate 10. An autopsy revealed that Pam had been stabbed and her throat slit. A rape kit was performed, and a DNA profile was obtained from the vaginal swab. Although the profile was not absolutely complete due to degeneration at some locations, it was extensive enough to genetically identify Pam's attacker as the same person who murdered Murray and Gina.

Authorities in Baton Rouge at this time recognized and acknowledged that a serial killer was

responsible for these murders. The Serial Killer Task Force was formed, and law enforcement began a massive search to identify the person whose genetic profile they obtained in all three murder cases.

On November 21, 2002, Trenisha Dené Colomb, a twenty-three-year-old attractive young woman disappeared from Lafayette. She last spoke to her father on November 21, 2002, and her car with her purse and keys were found in Grand Coteau near her mother's grave. Three days later, a hunter found Dené Colomb's body in the woods off Renaud Road in Scott, Louisiana. Dené was wearing only a t-shirt and bra and muddy socks and shoes. The forensic pathologist found that she died due to blunt force trauma to her head. A rape kit was taken, and the DNA analyst with the Acadiana Crime Lab obtained a profile from the vaginal swab that was a complete match to the profiles in the three previous murders.

Finally on March 3, 2003, Carrie Yoder, a twenty-six-year-old graduate student at LSU disappeared from her home near campus. There was no indication of a struggle in the residence other than a key holder that was askew, a broken necklace, and a small amount of blood on her purse. Authorities, family, and friends searched for Carrie until her body was found dumped at Whiskey Bay and partially submerged in water. The forensic pathologist determined that she was strangled, beaten, and stomped. A rape kit was taken, and a complete profile was obtained from the vaginal washings. Consistent but less clear profiles were obtained from the vaginal and cervical swabs.

The DNA profiles from this evidence matched the profiles obtained in the four other murders.

The investigation continued and hundreds of DNA swabs were submitted by various police agencies. On May 5, 2003, the Zachary Police Department and the Attorney General's Office worked in concert to obtain an article 66 subpoena for the DNA swab of Derrick Todd Lee. They submitted the swab for analysis, which was completed on May 25, 2003. In the meantime, on May 22, 2003, authorities connected Diane Alexander's case to the five murder cases and held a news conference to broadcast the composite sketch prepared by Diane. They began to receive phone calls identifying the sketch. On May 25, 2003, Natasha Poe completed the DNA analysis of the swab of Derrick Todd Lee and finally identified by name the genetic profile of the serial killer. Defendant's name was not released immediately because authorities wanted to apprehend him first. Prior to releasing the serial killer's identity, authorities sent Diane Alexander a photographic line-up including the picture of Derrick Todd Lee, and she immediately picked him out as the individual who attacked her.

The identity of the serial killer was released on May 26, 2003, and thereafter Derrick Todd Lee was located and arrested in Atlanta, Georgia. Pursuant to the court order, blood was drawn from defendant for DNA testing. In order to confirm prior testing, all the scientists re-ran their tests. The scientists individually confirmed that the profile from Derrick Todd Lee matched the profile on the evidence each evaluated.

The scientists testified at trial that the likelihood of randomly finding another individual other than defendant having the same genetic profile that was obtained from each piece of evidence containing a complete genetic profile is 1 in 3.6 quadrillion.

ARGUMENT

I. THE RULING OF THE LOUISIANA SUPREME COURT COMPORTS WITH THIS COURT'S RULINGS REGARDING THE INEVITABLE DISCOVERY DOCTRINE.

In defendant's first issue he presents to this court for review, he contends the Louisiana Supreme Court erred in allowing defendant's DNA evidence admissible at trial and asserts that the inevitable discovery doctrine is inapplicable to the present case. The state maintains that the result reached by the state court was proper and should be upheld on review.

In state court, the prosecution argued that the subpoena duces tecum obtained by the Attorney General's Office was a proper method for obtaining defendant's DNA profile, and also that although not labeled as a warrant, the subpoena duces tecum contained all the safeguards that a warrant would have afforded defendant. These arguments were rejected by the state's supreme court, and the state's third argument in the alternative was adopted: namely, that the DNA profile obtained by the subpoena duces tecum would have been obtained from

an independent source or discovered by inevitable discovery. Without conceding the merit of the state's first two theories, the prosecution submits that the Louisiana Supreme Court's decision was proper.

In *Nix v. Williams,* 467 U.S. 431, 443, 104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984), the United States Supreme Court discussed the inevitable discovery doctrine. In *Nix,* the court considered the question of exclusion or suppression of evidence in the context of a search for a missing girl in Iowa. More than 200 volunteers were searching for the missing girl. Searchers focused their search on an area that was several miles wide on both sides of Interstate 80. They were instructed to search all abandoned farm buildings, ditches, culverts, and any other place where the body of a small child could be hidden. During the course of the search, the defendant surrendered to police and was arraigned. Police assured his counsel that he would not be questioned as he was transported from Davenport to Des Moines. During the trip, police initiated conversation with the defendant, who ultimately told the police where the girl's body was located. When the search was halted for the day, search teams were within two and one-half miles of where the girl's body was located next to a culvert in a ditch beside a road two miles south of Interstate 80 in an area searchers planned to canvass.

Ultimately, the defendant was convicted of first-degree murder. His conviction was affirmed by the Iowa Supreme Court. Then, he sought federal habeas review of his conviction. The federal district court

concluded that the evidence had been wrongly admitted, and a divided court of appeals agreed. The supreme court granted certiorari, ruling that the defendant's statements could not be used against him but noted that the location of the body might be admissible in a second trial. At his second trial, the court admitted the evidence related to the body, indicating that the body would have been found "within a short time" had the search not been suspended. The defendant was again convicted, and his appeal was rejected. He sought federal habeas review again. This time, the federal district court agreed with the state courts, but the eighth circuit reversed. The supreme court granted the state's petition for certiorari.

The court described the independent source doctrine, as follows:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse,* position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.

Nix v. Williams, 467 U.S. at 443, 104 S.Ct. at 2509. This language has been quoted in subsequent United

States Supreme Court cases, such as *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988). The court noted that "[e]xclusion of physical evidence that would inevitably have been discovered adds nothing to either the integrity or fairness of a criminal trial." *Nix*, 467 U.S. at 446, 104 S.Ct. at 2510. Thus, the court ruled that the evidence, i.e., the murdered girl's body and evidence related thereto, was admissible.

In *Murray v. United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988), the United States Supreme Court explained the independent source doctrine. In that case, the court noted that officers had illegally entered a building and observed contraband. Withdrawing, the officers sought to obtain a search warrant based on the knowledge they possessed prior to entry into the building without informing the magistrate that they had entered the building or that they saw contraband inside the building. The court held that no suppression was necessary where the later search was conducted with a warrant that was obtained wholly independent of the illegal entry. The reasoning of the court is instructive as to the history of the doctrine and its scope. The court quoted the above-cited quotation from *Nix* as its explanation of the doctrine. The court explained that the inevitable discovery doctrine is, in fact, an extrapolation of the independent source doctrine. *Murray*, 487 U.S. at 539, 108 S.Ct. 2534. The court stressed that the exclusionary rule should not punish police officers who seek to obtain warrants

by utilizing the exclusionary rule. The court noted that the purpose of the exclusionary rule is to punish police misconduct. However, the court noted:

> To apply what we have said to the present cases: Knowledge that the marijuana was in the warehouse was assuredly acquired at the time of the unlawful entry. But it was also acquired at the time of entry pursuant to the warrant, and if that later acquisition was not the result of the earlier entry there is no reason why the independent source doctrine should not apply. Invoking the exclusionary rule would put the police (and society) not in the same position they would have occupied if no violation occurred, but in a *worse* one. *See Nix v. Williams*, 467 U.S., at 443, 104 S.Ct., at 2508.

Murray, 487 U.S. at 541, 108 S.Ct. 2535. The court also noted:

> The independent source doctrine does not rest upon such metaphysical analysis, but upon the policy that, while the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied.

Murray, 487 U.S. at 542, 108 S.Ct. 2535.

The import of these holdings is that no purpose is served by suppressing evidence pursuant to the exclusionary rule (which supposedly punishes bad conduct by the police) when that evidence would have been discovered in any event or when it could be

discovered by independent means. In the instant case, defendant is essentially seeking to suppress evidence in the form of the DNA characteristics that are special and unique to each individual. The record in this case amply notes that a serial killer had committed multiple murders and rapes, and at least one attempted murder and rape, in south Louisiana. DNA evidence was available to connect the crimes to each other. Police knew they were searching for one individual and had activated a multi-jurisdiction task force to seek evidence, follow leads, and where necessary to obtain DNA swabs from suspects. In addition, other agencies were reviewing any and all unsolved murder cases in an attempt to connect those cases to the serial killer investigation.

The quality and the quantity of evidence available to police officials, including the Serial Killer Task Force, Zachary Police Department, West Feliciana Parish Sheriff's Department, the Attorney General's Office, and St. Martin Parish Sheriff's Office was such that each agency came to regard defendant as a suspect. When the officials from the Attorney General's Office and Zachary Police Department sought to obtain defendant's DNA profile, they were the first to seek judicial authority, but they certainly would not have been the last.

Defendant's DNA was collected for purposes of investigating the Randi Mebruer murder case in Zachary, Louisiana. Detective Todd Morris testified at trial. On May 5, 2003, he testified he was employed as an investigator with the Attorney General's Office.

(Vol. XXXIV R. p. 8262; 10/6/04, tr. p. 26.) At that time, he was not a member of the Serial Killer Task Force, nor was he investigating the murders of Charlotte Murray Pace, Gina Green, Pam Kinamore, Dené Colomb, or Carrie Yoder. (Vol. XXXIV R. p. 8265; 10/6/04, tr. p. 29.) Detective Morris explained that the Attorney General's Office had been conducting an investigation regarding the homicide of Connie Warner and the homicide, missing body, and remains of Randi Mebruer. (Vol. XXXIV R. p. 8266; 10/6/04, tr. p. 30.) Because of these two cases, Detective Morris assisted in getting the subpoena duces tecum for defendant's DNA, and he was present when defendant's DNA was collected. (Vol. XXXIV R. pp. 30-32; 10/6/04 tr. pp. 8266-68.)

Attorney General's Investigator Dannie Mixon also testified he was not a member of the Serial Killer Task Force. Instead, he stated he obtained the subpoena duces tecum and collected defendant's DNA in connection with the Warner and Mebruer investigations. (Vol. XXXIV R. pp. 8282-83; 10/6/04, tr. pp. 46-47.)

Sergeant Ray Day, employed with the Zachary Police Department, testified that he took custody of the buccal swabs once they were collected from defendant. (Vol. XXXIV R. p. 8290; 10/6/04, tr. p. 54.) Sgt. Day stated that he turned the evidence over to the Louisiana State Police Crime Lab the following day, May 6, 2003. (XXXIV R. p. 8292; 10/6/04, tr. p. 56.) He stated that "[a]t the time I requested that I was turning this evidence in for testing in regards to

my Randi Mebruer case, but it could be cross-referenced to the other cases that were being investigated." (Vol. XXXIV R. p. 8294; 10/6/04, tr. p. 58.) He reiterated on cross-examination: "I told her [Michelle Woodham Vara at the Louisiana State Police Crime Lab] the reason I was logging my evidence in was based on a Zachary case, and that if they felt the need to cross-reference it, they could."

Sgt. Day's testimony in this regard was corroborated by the crime lab evidence technician, Michelle Woodham Vara. She verified that defendant's DNA evidence was submitted to the lab for testing in the Mebruer case but was cross-referenced to the cases involving the Serial Killer Task Force. (Vol. XXXIV R. pp. 8300-01; 10/6/04, tr. pp. 64-65.)

The reason that defendant's DNA was collected was made clear on the record at trial. Defendant's DNA was submitted to the crime lab in reference to the Randi Mebruer case in Zachary and cross-referenced to the cases involving the serial killer.

At the hearings on the motion to suppress, the state adequately established that defendant was about to undergo heavy scrutiny as a suspect and that, had it not been for the DNA test results confirming that he was the serial killer, other agencies would have sought and obtained judicial approval to obtain defendant's DNA.

Detective David Smith, one of the task force's team leaders, testified that each team was assigned leads to follow-up. Each lead was pursued until it was

satisfactorily disposed of, either by alibi, DNA, work records, or some other means by which the team could determine that the suspect named in the lead could not be the perpetrator. (Vol. XXI R. p. 5109; 4/22/04, tr. p. 30.) Detective Smith indicated that the first lead on defendant came on September 4, 2002. This lead was assigned to Shane Evans, but was "closed" when the task force focused its efforts on white males driving white trucks. (Vol. XXI R. pp. 5111-12, 5128; 4/22/04, tr. pp. 32-33, 49.)

The lead was later reopened by the task force on March 21, 2003, based on a fax received from the West Feliciana Sheriff's Office naming five possible suspects for the Serial Killer Task Force to consider, including the name of Derrick Todd Lee. At the time of the lead, the task force had begun to consider black males as viable suspects based on statements made by witnesses in the Carrie Yoder investigation. This "new" lead was assigned to Livingston Alfred, who went to defendant's home, but he was not present. Alfred discussed the matter with West Feliciana deputies who indicated that they knew defendant and would contact Alfred when they found him. (Vol. XXI R. pp. 5101-02, 5107, 5113-15; 4/22/04, tr. pp. 22-23, 28, 34-36.) Detective Smith indicated that, had the Attorney General's Office not obtained the DNA swab from defendant, the task force would have continued to investigate defendant. (Vol. XXI R. p. 5116; 4/22/04, tr. p. 37.) Detective Smith also described the procedures the task force employed to obtain DNA swabs. First, they would attempt to get

the suspect to consent or to provide a viable and provable alibi. If a suspect refused, Detective Smith indicated that the "entire team would be dedicated to resolving that lead in one way or another." This would include surveillance of the person, court orders to obtain background information, and trying to establish probable cause. If they could not get a court order, the task force would continue the surveillance and obtain DNA by surreptitious means. Detective Smith indicated other means for obtaining DNA from suspects was to obtain it from cigarette butts, Coke cans, and food left in trash containers. Detective Smith indicated that the task force was able to obtain DNA in "several cases" using such surreptitious means. (Vol. XXI R. pp. 5117-18; 4/22/04, tr. pp. 38-39.) Again, he indicated that the task force would have pursued the lead it had on defendant utilizing the described methods until his name was cleared or they obtained a DNA match.

Corporal Mary Ann Godawa, spokesperson for the task force, testified and revealed how the tenor of the investigation changed suddenly and dramatically. She indicated that a poster or flyer had been released by the task force in conjunction with the Lafayette Parish and St. Martin Parish Sheriff's Offices. The poster had a composite drawing of the suspect in the attempted rape and attempted murder of Diane Alexander, the only known living victim of the serial killer, and a description of the vehicle the suspect was driving. The task force held a press conference and released the information to the public because they

believed the serial killer was the person depicted by the Alexander composite. (Vol. XXI R. p. 5140; 4/22/04, tr. p. 61.)

Although defendant had been swabbed on May 5, 2003, the results of this procedure had not been determined as of May 23, 2003. The results were released to the task force on the evening of May 25, 2003. (Vol. XXI R. pp. 5141-42; 4/22/04, tr. pp. 62-63.)

Detective Darryl Rice, who was the Assistant Commander of the Command Post and the Chief Logistics Officer for the task force, testified regarding the tip line and procedures that were employed in relation to incoming tips. Detective Rice described various tips that the task force received immediately following the release of the composite drawing.

The first of these new tips came in at 2:24 p.m. on the day of the release of the composite. The caller indicated:

> Thinks she knows the person because of the description of the car, a gold Mirage. He was a peeping tom before. She thinks his name is Todd Lee. He is from St. Francisville. He is always in and out of jail. His wife had a type of car [ ] they are describing. Not long ago he was charged with a crime similar to breaking in. Call her if you need more information.

(Vol. XXI R. p. 5149; 4/22/04, tr. p. 70.) This lead was not followed up prior to defendant's arrest on May 27, 2003.

A second tip was received on May 23, 2003, at about 6:16 p.m. An e-mail to the task force indicated as follows:

> The caller stated in the narrative: Caller works for a local sheriff's office. He knows someone that has a past criminal history for stalking women from the St. Francisville area. His name is Derrick Lee, about 5'10". The suspect made the comment that he had killed a woman he was dating before. The suspect fits the sketch. He's light-complected, black male. He had a small gold car at one time. He keeps himself up really clean, keeps his hair short, thin mustache and he has a muscular build.

(Vol. XXI R. p. 5151; 4/22/04, tr. p. 72.)

Another tip was received on May 24, 2003, at 5:41 p.m., again by e-mail. That tip was described as follows:

> The event narrative here was he was looking at the picture of the man on the front page of *The Advocate*. His name is Derrick Lee and he lives in St. Francisville. He has a history of being a peeping tom and was the prime suspect in a double homicide in Zachary. Randy Metz with the West Feliciana Sheriff's Department can tell you more about the case.

(Vol. XXI R. p. 5152; 4/22/04, tr. p. 73.)

Finally, testimony indicates that a fourth tip came in to the task force on May 24, 2003, and indicated the following:

> The event narrative here is calling to report a man that fits the description of serial killer. This man has a gold Mirage that is wrecked in the front, and the man that tried to rape a woman in Breaux Bridge had a gold Mirage that was wrecked in the front too. He is the exact same man in today's paper except that his lips need to be a little bit bigger. His name is Derrick Todd Lee and he used to live on Highway 61 right after you pass the truck stop called Southern Belle. The car is parked in front of his mother's house in St. Francisville on Blackmore Road. His whole family lives in that area and he never moved out of the house but just disappeared with wife and kids.

(Vol. XX R. p. 5153; 4/22/04, tr. p. 74.)

From the foregoing, it should be clear that the dragnet was closing in on Derrick Todd Lee. Various agencies were pursuing him as a suspect, and more leads were coming in every day. Once the task force focused on him as a suspect and more narrowly focused its investigation, it was inevitable that it would have obtained his DNA, either by obtaining his consent, obtaining a search warrant, or by obtaining it surreptitiously.

In the instant case, the many governmental agencies who were pursuing leads that invariably

converged on defendant should not be punished by the exclusion of DNA evidence that was obtained by another agency, especially where the other governmental agency obtained judicial approval for the seizure of DNA. As noted by the court in *Murray* and *Nix*, the state agencies should not be placed in a worse position than had they not sought judicial approval. Likewise, no interest of society is served, and, in fact, the integrity of the entire judicial process is called into question when a court suppresses evidence as defendant requested.

The Louisiana Supreme Court's analysis under this Honorable Court's inevitable discovery doctrine was correct. The state supreme court opined as follows:

> One of the theories courts use in addressing "fruit of the poisonous tree" issues is the inevitable discovery rule. The inevitable discovery doctrine "is in reality an extrapolation from the independent source doctrine: Because the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered." *Murray v. United States,* 487 U.S. 533, 539, 108 S.Ct. 2529, 2534, 101 L.Ed.2d 472 (1988). A functional similarity exists between the independent source and inevitable discovery doctrines because both seek to avoid excluding evidence the police "would have obtained . . . if no misconduct had taken place." *Nix v. Williams,* 467 U.S. 431, 444,

104 S.Ct. 2501, 2509, 81 L.Ed.2d 377 (1984). The State therefore bears the burden of proving by a preponderance of the evidence that "the information ultimately or inevitably would have been discovered by lawful means. . . ." *Id.*; *State v. Vigne,* 01-2940 (La.6/21/02), 820 So.2d 533, 539. Application of the inevitable discovery doctrine thus "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. . . ." *Nix v. Williams,* 467 U.S. at 444, 104 S.Ct. at 2509 n. 5; *State v. Vigne,* 820 So.2d at 539.

Integral to the proper application of the inevitable discovery doctrine is a finding that law enforcement *would* have inevitably secured the evidence by lawful means, not simply that they *could* have. Thus, a mere showing that the police had probable cause for a search and could have secured a warrant from a neutral magistrate does not satisfy the doctrine, because it would effectively obviate the Fourth Amendment preference for warrants and reduce the exclusionary rule to cases in which the police lack probable cause. *See United States v. Elder,* 466 F.3d 1090, 1091 (7th Cir.2006) ("The usual understanding of that doctrine is that the exclusionary rule should not be applied when all the steps required to obtain a valid warrant have been taken before the premature search occurs [citing *Murray v. United States,* 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988)]. . . . If probable cause alone – without putting in train the process

> of applying for a warrant – were enough to invoke the inevitable-discovery doctrine, that would have the same effect as limiting the exclusionary rule to searches conducted without probable cause."); *see also* 6 LaFave, *Search and Seizure,* § 11.4, at 278-79 (Fourth Ed.) ("Circumstances justifying application of the 'inevitable discovery' rule are most likely to be present if these [independent] investigative procedures were already in progress prior to the discovery via illegal means, as in *Nix v. Williams,* or where the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later.").

Lee, 05-2098 at pp. 22-24, 976 So.2d at pp. 127-28.

The state supreme court then detailed the facts of the present case as applied to the federal standard. The court denoted that two separate lines of criminal investigations involving defendant were ongoing before the issuance of the subpoena duces tecum in this case. Even though one of defendant's leads was "closed" by the police, the state court explained how and when a new tip refocused attention on defendant's activities. The state court further explained:

> Even though this evidence demonstrates "historical facts capable of ready verification or impeachment" as enunciated in *Nix,* we need not rest our resolution of the inevitable discovery rule on these facts alone. As the chronology of events unfolded, it is important

> to remember that although defendant's buccal swabbings were obtained on May 3, 2003, Natasha Poe, the analyst in the State Police Crime Lab who examined the swabbings, testified at trial that she did not begin her analysis until May 20 because she was out of town, and did not conclude her testing until May 23, 2003. She then reported her findings immediately to her superior who evidently did not convey them to the Task Force until May 25, 2003.

Lee, 05-2098 at p. 27, 976 So.2d at p. 129.

The court next detailed how the hunt for the killer intensified with the release of the composite drawing as described by Ms. Alexander and the description of the attacker's car as seen by Ms. Alexander's son. The release of this new information quickly brought about four more tips leading directly to defendant.

The Louisiana Supreme Court properly concluded:

> Considering the historical facts that are verifiable, we find the State satisfied its burden of showing by a preponderance of the evidence there was a parallel and independent investigation unrelated to the illegal search that would have inevitably and legally yielded defendant's DNA. When viewed in light of the Task Force's receipt of four rapid-fire tips identifying defendant by name and make of car after the release of the sketch of the serial killer, it is apparent

defendant's apprehension was no longer an object of pure speculation, but rather a matter of imminent reality. The tips various citizens called in provided probable cause to arrest defendant as Alexander's assailant. Through the pursuit of this entirely independent investigation based on information entirely untainted by the prior collection of defendant's DNA sample, it is evident the police *would* have arrested the defendant and *would* have secured a DNA sample. Thus, the State has shown: (1) there is a reasonable probability the contested evidence would have been discovered by lawful means in the absence of police misconduct; and (2) law enforcement was actively pursuing a substantial alternate line of investigation at the time of the constitutional violation. *See e.g., United States v. Lamas,* 930 F.2d 1099, 1102 (5th Cir.1991); *United States v. Cherry,* 759 F.2d 1196, 1205-1206 (5th Cir.1985); *cf. United States v. James,* 353 F.3d 606, 616 (8th Cir.2003) (no proof of inevitable discovery given absence of evidence that there was actual, alternative investigation which would have led to discovery of evidence); *United States v. Procopio,* 88 F.3d 21, 27 (1st Cir.1996) (inevitable discovery exception applicable when local police would have certainly contacted local agents and secured a warrant on their own); *United States v. Drosten,* 819 F.2d 1067, 1071 (11th Cir.1987) (inevitable discovery exception applicable when evidence indicated police knew witness's telephone number and were actively pursuing

> evidence of his name through lawful avenue of discovery when illegal search revealing name occurred); *Davis v. Georgia,* 262 Ga. 578, 583, 422 S.E.2d 546, 551 (1992) (no inevitable discovery found where the State did not show a standard procedure where warrant would have been sought following 10-year-old child's telephone call stating that drugs were in house).

Lee, 05-2098 at pp. 29-30, 976 So.2d at p. 131.

The trial court protected defendant's constitutional rights by meticulously proceeding through the various legal arguments that were pertinent in this case. A review of the record reveals that the trial court committed no error in ruling on defendant's motion to suppress, and the ultimate decision of the Louisiana Supreme Court was correct. Relief should be denied.

II. THE LOUISIANA SUPREME COURT CORRECTLY DENIED DEFENDANT'S MOTION FOR A CHANGE OF VENUE BASED ON PRETRIAL PUBLICITY; DEFENDANT RECEIVED A FAIR TRIAL BY AN IMPARTIAL JURY.

Defendant claims the trial court erred in not granting defendant's motion for a change of venue and that he was denied a fair trial by an impartial jury due to the trial court's decision. The state submits that under the circumstances of the present

case, no error was made, and the decision of the state's supreme court should be upheld.

The Louisiana Supreme Court in its opinion correctly delineated the standard applied by this Honorable Court as follows:

> The constitutional standard of fairness requires a defendant have a panel of impartial, indifferent jurors. *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). To hold the mere existence of any preconceived notion about the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Murphy v. Florida*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), citing *Irvin v. Dowd*, 366 U.S. at 723, 81 S.Ct. at 1642. "At the same time, the juror's assurances that he is equal to this task cannot be dispositive of the accused's rights, and it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality." *Id.*

Lee, 05-2098 at p. 37, n. 12, 976 So.2d at p. 135.

In Louisiana, La. Code Crim. P. art. 621 sets forth the time for filing a motion for a change of venue, the contents of such a motion, and the fact

that a contradictory hearing shall be held upon the motion. Grounds for a change of venue are found in La. Code Crim. P. art. 622.

The Louisiana Supreme Court analyzed in detail the issue of pretrial publicity in this case. Considerations included in the analysis were the nature of pretrial publicity, the comments of government officials, the length of time between comments and the trial, the severity and notoriety of the offense, the areas from which the jury was drawn, other community events that either affect or reflect the community attitude toward defendant, and factors that likely affect the candor and veracity of prospective jurors. The state supreme court correctly concluded "[a]fter carefully reviewing the record of this matter, defendant failed to show the trial court abused its discretion in denying his motion for a change of venue." *Lee*, 05-2098 at p. 40, 976 So.2d at p. 137.

Defendant in his application to this court cites the case of *Leonard v. United States*, 378 U.S. 544, 84 S.Ct. 1696, 12 L.Ed.2d 1028 (1964), as being a case similar to the present matter. *Leonard*, however, is a per curiam decision which holds that prospective jurors cannot serve on a defendant's second successive jury if those prospective jurors were present in open court and heard the guilty verdict pronouncement in the prosecution of that same defendant in his first trial. In *Leonard*, the second jury that found the defendant guilty actually contained five jurors who were physically present during the reading of the first

trial's guilty verdict. *Leonard*'s facts are entirely distinguishable from those of the instant case.

Defendant in the present case filed his original motion for a change of venue on July 17, 2003. (Vol. I R. pp. 193-95.) The state's answer was filed on August 13, 2003. (Vol. II R. pp. 382-85.) In that motion the state asserted that a change of venue based on pre-trial publicity was unjustified

> in light of the fact that East Baton Rouge Parish (which is the Nineteenth Judicial District), by the 2000 census has a population of approximately 412,000, which makes it the third largest parish in the state by population, which provides a mass for an expanded jury venire. East Baton Rouge Parish has a history of high profile murder cases and experience has proven that even in a media saturated case, a fair and impartial jury can be selected by the Voir Dire process available to the court, state and defense which provides for exclusion of jurors who have formed a fixed opinion in advance of trial.
>
> While the defendant claims statements made to the media by District Attorney Doug Moreau, First Assistant District Attorney John W. Sinquefield and law enforcement officials have added to the publicity, he fails to mention that neither Moreau nor Sinquefield have discussed any evidence in the case or made any statements other then general comments on procedure and court proceedings. Defendant failed to note in his motion that Mr. Mike Mitchell, his lead counsel, has

> been quite prominent in the media, along with persons associated and/or aligned with the defense, making statements favorable to the defendant and his defenses. He also fails to mention that Assistant Public Defender Bruce Ungast [sic] actually made a statement which was televised, to the effect that local jurors might be acceptable since the local population is familiar with the (supposed) failings of the Multi-Agency Homicide Task Force, which might work to the favor of the defendant.
>
> It is often months or years between indictment and trial of a capital murder case, thus, defendant's motion is premature at this time and should be deferred until the Voir Dire process and then either granted or denied, depending on the Court's experience of whether or not a fair jury can be obtained ***at the time of the trial***.

(Vol. II R. p. 383.) (Emphasis original.) In-court argument concerning the motion for a change of venue occurred on October 8, 2003, and it was agreed that another date would be set for an additional hearing in the matter. (Vol. XVII R. pp. 4023-24; 10/8/03, tr. pp. 7-8.) Next, defendant filed a motion to continue the venue hearing and an amendment to that motion. (Vol. VI R. pp. 1318-24.) A court appearance was made in connection with the motion. (Vol. XIX R. pp. 4526-63.) A second supplemental motion concerning the motion for a change of venue was filed on February 27, 2004. (Vol. VI R. pp. 1440-42.) A change of venue hearing took place on March 1,

2004. (Vol. XIX-XX R. pp. 4564-4802.) A ruling on the motion was deferred until after the jury was chosen for trial. (Vol. XXXII R. p. 7890; 10/4/04, tr. p. 13.)

Voir dire in this case took place over a period of thirteen days: on September 13, 14, 15, 17, 20, 21, 22, 23, 24, 27, 28, 29, and 30, 2004. Although almost all prospective jurors had heard of defendant or his crime in some manner, the jurors who could not put pretrial publicity out of their minds were excused during the voir dire process. The subject of pretrial publicity was thoroughly discussed with the prospective jurors so that any impartial jurors did not serve. All of the jurors who were picked to serve on defendant's jury assured the trial court that they could decide the case based solely on the evidence presented at trial, that they could put aside any notions of guilt that they may have heard of in the media, and that they would give defendant the presumption of innocence. Jurors at all times were admonished by the trial court not to read or listen to anything in the media concerning defendant's case.

Defendant failed to demonstrate that pretrial publicity in this case denied defendant a fair and impartial trial. The state court's decision was correct and should be upheld on appeal.

CONCLUSION

For the foregoing reasons, the state respectfully requests that this court deny petitioner's application for writ of certiorari.

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